June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I'm writing to strongly recommend Emily True for a position as law clerk in your Chambers. Emily is currently a first-year associate at the New York office of Latham & Watkins, where I am a partner in the Supreme Court and Appellate practice group. Emily has done a substantial amount of work for me across a number of different cases, including (1) helping me prepare for an argument at the U.S. Supreme Court; (2) drafting substantive research memos on challenging issues in several of our cases; and (3) leading the charge in a significant affirmative litigation involving a First Amendment challenge to a law limiting academic speech. In each of these tasks, Emily's work has been consistently outstanding. And, equally important, Emily is a truly delightful colleague. I'm absolutely convinced that she would make a wonderful addition to the life of Chambers, and quickly become a trusted and invaluable resource.

In my practice, I work with junior associates on writing tasks very similar to the work they will conduct as a law clerk. A junior associate will typically research the law, prepare memorandums addressing the key issues in a case, help draft sections of a brief, and then help prepare me for oral argument. In assisting with these tasks, I can attest that Emily is one of the strongest first-year associates I have ever worked with. Her legal writing is sharp and incisive, she is a natural and clear communicator, and her research is always diligent and thorough. For example, in preparing me for my Supreme Court argument addressing the appropriate remedy for a violation of the constitutional venue right, Emily prepared an outstanding, sophisticated and comprehensive memo on the history of the use of special verdicts at common law, during the founding, and today. Several questions were asked on the subject at argument, and Emily's careful research proved invaluable. Similarly, for our First Amendment litigation, Emily has devoted countless hours to (1) researching and synthesizing difficult areas of law; (2) interviewing and evaluating potential plaintiffs; and (3) working up detailed fact declarations to support our litigation. In all of these diverse tasks, I know I can rely on Emily to produce timely and comprehensive work—and at a quality far beyond what I would expect from a first-year associate.

In short, I think Emily would be a terrific fit for a clerkship in your Chambers. Her friendly and engaging personality will be a wonderful addition to a close-knit chambers community, and her diligence and sharp thinking are ideal for work as a law clerk. While her academic record is, of course, strong, I think it considerably understates Emily's talents. In my practice, I routinely work with the best young lawyers in the country—including numerous Supreme Court clerks and those who have graduated at the top of their classes. Emily's legal aptitude stands up to the very best. I recommend her without reservation.

Samir Deger-Sen

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June 12, 2023

RE: Emily True

Dear Judge:

It is my privilege to recommend Emily True for a clerkship with your chambers. I supervised Ms. True during the Fall 2021 and Spring 2022 Academic Semesters in my role teaching and supervising the Reproductive Justice Clinic at New York University School of Law (the "Clinic"). We met several times each week in a seminar and in meetings about her legal fieldwork. A committed professional, Ms. True is a pleasure to work with and to know.

Ms. True gave consistently strong performances in the Fall 2021 and Spring 2022 seminars. She was always prepared for class and brought insights to discussion. The Fall 2021 seminar involves substantial case law reading, and Ms. True analyzed the cases thoughtfully and well. During the Spring 2022 seminar, Ms. True gave a well-researched and visually very informative presentation on the history, purpose and strategies of non-medical organizations defined as Crisis Pregnancy Centers, including the success of such centers in garnering public funding that might otherwise go to support needed and wanted reproductive health care.

Ms. True was equally strong in the fieldwork component of the Clinic. During the Fall 2021 semester, Ms. True worked with a team researching Minnesota's Rules of Evidence on admissibility of expert testimony. The research anticipated motions to exclude several of our client's experts, so the team had to read case law in view of its relevance to various types and sources of expertise. Ms. True's first research task was parsing the Minnesota Frye-Mack test, which is the standard Minnesota applies in determining whether to admit expert testimony involving a novel scientific theory. When and how that test is used is nuanced and Ms. True did an excellent job mining the caselaw to identify the conditions under which the standard is and is not to be used. At the end of the semester, the team worked on an expedited schedule to contribute to a successful memorandum of law opposing motions to exclude a number of our client's expert witnesses. On fast turnaround and at the eve of Fall finals, Ms. True drafted a powerful response arguing specifically the relevance and importance of a historian's expert testimony, successfully countering the argument against admission of expert testimony which the opposition dismissively characterized as a roving "history of patriarchy in the laws of the nation." Ms. True cogently demonstrated the unique and case-pertinent insights offered by the expert and drew forward landmark U.S. Supreme Court cases specifically discussing the importance of historical information in

understanding a case in context, which was the ultimate point of the historian's proffered testimony.

Ms. True's Spring 2022 fieldwork was complicated, and her work was outstanding. Her team advised a client on the requirements for bringing a facial challenge in South Dakota courts. Ms. True surveyed the South Dakota state courts' concept of facial challenge to arguments about constitutionality on equal protection and procedural due process grounds. Reviewing numerous case decisions under each doctrine, she gave careful attention to the subtleties in application of each doctrine to the particular facts in each case. Ms. True read and re-read the cases to truly understand the differing facts, and not just recite the doctrine's tests. She provided a thorough memorandum that apprised our client of what is required by each test, including commentary about variations in each doctrine's application that might be important to note depending on the context. This was impressive work and showed an ability to steer a complex project from start to finish.

Ms. True is also a natural leader, who shows impressive willingness and ability to humbly assume leadership and inspire collegial work.

If you have any questions regarding Ms. True or her work, I would be pleased to speak with you. I can be reached by email, at sarah.burns@nyu.edu or by cell phone, (845) 820-1671. Thank you.

Sincerely,

Sarah E. Burns

Sarah E. Burns

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Writing Sample

My writing sample is an excerpted portion of a longer memorandum I helped to prepare as part of my fieldwork for the New York University School of Law Reproductive Justice Clinic. It addresses the legal standards South Dakota state courts use to assess equal protection claims. The full memorandum also addressed the legal standards for facial challenges on overbreadth, vagueness, and procedural due process grounds. Some parts of the full memorandum were written by a classmate, and we received minor structural feedback from our clinical professor on the memorandum. The portions excerpted for my sample are my own writing.

The memorandum was produced for an organizational client; the client has given permission for me to share this excerpted portion. To preserve client confidentality, the name of the client, the client's facts, and the specific state statutes the client sought to challenge have been removed.

To: New York University School of Law Reproductive Justice Clinic Client
From: Emily True
Re: Standards for Equal Protection Challenges in South Dakota State Court

Question Presented

How will state courts in South Dakota assess an equal protection challenge to a currently enforced South Dakota state law?

Short Answer

This memo describes the substantive and legal standards for equal protection claims in South Dakota state courts. Any challenge to a South Dakota state law must overcome a strong presumption of constitutionality for legislative enactments. The plaintiff bears the burden of proving beyond a reasonable doubt that the statute violates a constitutional provision.

Equal Protection. Almost all South Dakota court decisions treat federal and state equal protection claims in the same manner. Most equal protection challenges brought in state courts are assessed under rational basis review. The South Dakota rational basis test examines whether: 1) the statute sets up arbitrary classifications between citizens, and 2) there is a rational relationship between the classification and a legitimate legislative purpose. *In re Davis*, 2004 SD 70, ¶ 5, 681 N.W.2d 452, 454. South Dakota courts have struck down legislative enactments on rational basis grounds, indicating that the state court rational basis test has more teeth than its federal counterparts. *See generally, e.g.*, *Aberdeen v. Meidinger*, 233 N.W.2d 331 (S.D. 1975).

South Dakota also recognizes varying levels of scrutiny for certain classes: strict scrutiny for fundamental rights or suspect classes, intermediate or substantial relation test for legitimacy and gender, and rational basis test for all other classes. *Lyons v. Lederle Lab., Div. of Am. Cyanamid, Co.*, 440 N.W.2d 769, 771 (S.D. 1989). South Dakota courts seem to generally

default to a rational basis test; very few equal protection challenges have been analyzed under heightened scrutiny.

Discussion

Below, I review how South Dakota state courts assess constitutional challenges on equal protection grounds. The first section addresses South Dakota's strong presumption of constitutionality for statutes and legislative enactments. I then examine how South Dakota courts treat equal protection causes of action.

I. The Strong Presumption of Constitutionality for Legislative Enactments.

In cases involving challenges to South Dakota statutes, South Dakota courts give significant deference to statutes and other legislative enactments. Constitutional challenges to statutes meet "formidable restrictions." *State v. Hauge*, 1996 SD 48, ¶ 4, 547 N.W.2d 173, 175.[1] Laws enacted by the legislature are presumed reasonable, valid, and constitutional. *Asmussen*, 2003 SD at ¶ 2, 668 N.W.2d at 728 ("This Court recognizes a strong presumption that a statute is constitutional); *Steinkruger v. Miller*, 2000 SD 83, ¶ 8, 612 N.W.2d 591, 595 (same); *Oien v. Sioux Falls*, 393 NW.2d 286, 289 (S.D. 1986) (noting a "strong presumption that the laws enacted by the legislature are constitutional"). This presumption is applied to claims made both under the state and federal constitutions. *See State v. Krahwinkel*, 2002 SD 160, ¶ 43, 656 N.W.2d 451, 465–66 (addressing state and federal constitutional challenges); *Sedlacek v. South Dakota Teener Baseball Program*, 437 N.W.2d 866, 868 (S.D. 1989) (same).

[1] South Dakota state courts typically require case citations to include both the official reporter (N.W.2d) and the South Dakota Supreme Court regional reporter (SD). The SD volumes are reported South Dakota Supreme Court decisions numbered according to the year of the decision's issuance, and corresponding pincites follow a paragraph format. So, for example, if I cite: *State v. Hauge*, 1996 SD 48, ¶ 4, 547 N.W.2d 173, 175, this means that *Hauge* was decided in 1996, ¶ 4 is the pincite, and then the corresponding parallel citation to the official reporter follows. Additionally, only cases published in 1996 and after have both the official and regional reporter, so only those cases will have parallel citations. *See* S.D. R. Civ. Proc. § 15-26A-69.1 (2010).

"When the constitutionality of a statute is challenged, this court will uphold the statute unless its unconstitutionality is shown beyond a reasonable doubt." *State v. Heinrich*, 449 N.W.2d 25, 27 (S.D. 1989). The challenger of the statute bears this burden of proof. *Steinkruger*, 2000 SD at ¶ 8, 612 N.W.2d at 595. This presumption is overcome when the challenger of the statute can prove that "the unconstitutionality of the act is, 'clearly and unmistakenly [sic] shown and there is no reasonable doubt that it violates constitutional principles.'" *Asmussen*, 2003 SD at ¶ 2, 668 N.W.2d at 728 (quoting *South Dakota Educ. Association/NEA By and Through Roberts v. Barnett*, 1998 SD 82, ¶ 22, 582 N.W.2d 386, 392).

The South Dakota Supreme Court rarely goes into depth analyzing the presumption as it applies in a case, and in every surveyed case does not appear to decide the constitutionality of statutes solely based on the presumption. Instead, the Court will often briefly acknowledge the presumption of constitutionality and then move to analysis of the constitutional challenge.[2] One rare example of the Court analyzing the presumption of constitutionality in greater depth occurs in *Sedlacek*. A plaintiff filed a complaint with the South Dakota Human Rights Commission after she was not allowed to participate in a state baseball tournament because the tournament banned girls from participating. 437 N.W.2d at 867. Her complaint was dismissed by the Commission on the grounds that SDCL 20-13-22.1(2), a statutory exception allowing for sex-segregated

[2] The South Dakota Supreme Court tends to address the presumption of constitutionality first in its analysis. *See Steinkruger*, 2000 SD at ¶ 8, 612 N.W.2d at 595; *Asmussen*, 2003 SD at ¶ 2, 668 N.W.2d at 728. Rarely, however, does the Court go into more detail regarding analysis of the presumption. *See Stark*, 2011 SD at ¶ 10, 802 N.W.2d at 169 (reviewing the presumption of constitutionality before proceeding into overbreadth and vagueness analysis of the statute at issue); *Steinkruger*, 2000 SD at ¶ 8, 612 N.W.2d at 595 (reviewing constitutional interpretation and presumption of constitutionality rules before assessing claims against the constitutionality of forced medication statutes); *Asmussen*, 2003 SD at ¶ 2, 668 N.W.2d at 728 (initially discussing that statutes are presumed constitutional and the challenger must refute the presumption beyond a reasonable doubt as part of the initial standard of review).

In at least one case, the Court analyzed the merits of the claim and noted that the presumption applies at the end of its analysis. *See Behrns*, 229 N.W.2d at 89–90 (Concluding that "[i]n applying these tests to the . . . statute [at issue,] we must remember that 'Statutes should not be declared unconstitutional unless their infringement on constitutional rights leaves no reasonable doubt.'" (quoting *Berens v. Chicago*, 120 N.W.2d 565, 570 (S.D. 1963)).

activities (such as scouting programs and fraternities), exempted the baseball program from the provisions of the South Dakota Human Rights Act. *Id.* The plaintiff appealed the dismissal of her complaint to a trial court, and the court held that the statutory exception was an unconstitutional deprivation of equal protection under both the South Dakota and United States Constitutions. *Id.* The South Dakota Supreme Court subsequently reversed the trial court's decision that the statutory exception was facially unconstitutional. *Id.* at 869. The Supreme Court noted that the trial court made two critical analytical errors: 1) the trial court "gave no heed" to the presumption of constitutionality for legislative enactments, and 2) it did not determine whether plaintiff met the burden of proving beyond a reasonable doubt the statute was unconstitutional. *Id.* at 868–69. The Court then proceeded through analysis of the specific claims after acknowledging the trial court erred with regards to the presumption of constitutionality. *Id.* at 860.[3]

The South Dakota Supreme Court has explained that "[o]rdinarily, we review the constitutionality of a statute only when it is necessary to resolve the specific matter before us, and then only to first decide if the statute can be reasonably construed to avoid an unconstitutional interpretation." *Steinkruger*, 2000 SD at ¶ 8, 612 N.W.2d at 595 (citing *City of Chamberlin v. R.E. Lien*, 521 N.W.2d 130, 131 (S.D. 1994)). Courts "must adopt any reasonable and legitimate construction" of the statute at issue that will allow the statute to be constitutionally upheld. *Oien*, 393 N.W.2d at 289.

South Dakota Supreme Court decisions generally demonstrate the Court's strong resistance to finding state statutes unconstitutional. *See, e.g.*, *Heinrich*, 449 N.W.2d at 27

[3] The lower court in *Sedlacek* found that the statute at issue was unconstitutional under the equal protection clauses of both the South Dakota and United States Constitutions. There was no distinction made between the federal equal protection clause and the South Dakota equivalent; the court conducted one analysis of the equal protection issue using the two-part test outlined in *Aberdeen v. Meidinger*, 233 N.W.2d 331 (S.D. 1975). *See* Section II for full review of equal protection challenges in South Dakota courts.

(finding constitutional a statute revoking the right of an individual to refuse to submit to a blood alcohol test on suspicion of driving while intoxicated if the individual has twice previously been convicted of driving under the influence); *Steinkruger*, 2000 SD at ¶¶ 18–21, 612 N.W.2d at 599–600 (holding that a South Dakota forced medication statutory scheme comported with due process requirements by incorporating a "least restrictive alternative" requirement for forced medication orders and therefore was constitutional both facially and as applied to the patient suing); *Asmussen*, 2003 SD at ¶¶ 2, 9, 18, 668 N.W.2d at 728, 731, 734 (reversing a trial court decision finding that a South Dakota statute criminalizing stalking was overbroad on its face and unconstitutionally vague); *Stark*, 2011 SD at ¶¶ 9–16, 802 N.W.2d at 168–71 (upholding the constitutionality of South Dakota statutes that prohibit sex offenders from loitering in community safety zones). Notably, in *Oien*, the Court did find that statutes granting municipal parks immunity, which prevented a mother from suing the city for negligence, were unconstitutional under South Dakota Constitution Article VI, § 20, known as the "open courts provision." 393 N.W.2d at 288, 291. The dissent in *Oien*, however, argued that the plaintiff did not meet the "beyond a reasonable doubt" standard of proof needed to rebut the presumption that the park immunity states were constitutional. *Id.* at 291–92.

II. South Dakota Has Found Some Statutes Unconstitutional Solely on a Rational Basis Analysis of the Legislative Classifications and Also Recognizes a Higher Level of Scrutiny is Due in Some Circumstances.

Equal protection challenges are typically brought both under the Equal Protection Clause of the Fourteenth Amendment and its corresponding state counterpart, Article VI, § 18 of the South Dakota Constitution. *See, e.g.*, *Heinrich*, 449 N.W.2d at 27. Article VI, § 18, also referred to as the Privileges and Immunities Clause, provides: "no law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." S.D. CONST. art. VI, § 18. However, at

least one decision has noted there is a difference between the state and federal clauses: "the term 'equal protection' does not appear in Art. VI, § 18, and research leads us to believe that the tests used in applying the federal and state guarantees are not identical. Article VI, § 18, is, if anything a more stringent constitutional standard than the Fourteenth Amendment." *Behrns*, 229 N.W.2d at 88. Other decisions seem largely not to make this distinction. *See, e.g.*, *Krahwinkel*, 2002 SD at ¶ 19, 656 N.W.2d at 460.

In assessing an equal protection challenge, the South Dakota Supreme Court will generally start with the presumption of constitutionality for legislative enactments. *See supra* I. The Court will often note that the task of classification is "primarily for the Legislature" and the Court "will not interfere 'unless the classification is clearly arbitrary and unreasonable'" in the context of an equal protection challenge. *See Krahwinkel*, 2002 SD at ¶ 18, 656 N.W.2d at 460 (quoting *Berens v. Chi, Milwaukee, St. Paul & Pac. R.R. Co.*, 120 N.W.2d 565, 570 (S.D. 1963)). As an example, in *Behrns*, the South Dakota Supreme Court upheld a statute whose underlying rationale had been both criticized and found unconstitutional by courts in other states. 229 N.W.2d at 90. The Court noted that while they agree with other courts that the statute is "unreasonable social policy," this Court's inquiry must examine "the rational connection between the legislative means and the legislative ends, not the wisdom of any social policy embodied in those ends." *Id.* at 92.

This memo will first discuss the South Dakota rational basis analysis, which state courts appeared to apply with more bite than federal courts do for the federal standard. A section on heightened scrutiny follows.

A. Courts have struck down some statutes under the South Dakota rational basis test.

"'When a statute has been called into question because of an alleged denial of equal protection of the laws,' [South Dakota courts] employ [a] traditional two-part test.'" *In re Davis*,

2004 SD 70, ¶ 5, 681 N.W.2d 452, 454 (quoting *Acct. Mgmt. v. Williams*, 484 N.W.2d 297, 299–300 (S.D. 1992)). This test examines: 1) whether the statute sets up arbitrary classifications between citizens, and 2) provided the classification does not involve a fundamental right or suspect class, whether there is a rational relationship between the classification and some legitimate legislative purpose. *Id.* at ¶ 5, 681 N.W.2d at 454; *Krahwinkel*, 2002 SD at ¶ 19, 656 N.W.2d at 460; *Aberdeen*, 233 N.W.2d at 333. For a classification to be upheld, it "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike." *Behrns*, 229 N.W.2d at 88 (quoting *Reed v. Reed*, 404 U.S. 71, 92 (1971)). Classifications are arbitrary "only if they were made 'without adequate determining principle.'" *Davis*, 2004 SD at ¶ 7, 681 N.W.2d at 455 (quoting *Acct. Mgmt.*, 484 N.W.2d at 300).[4]

Examples of this analysis follow. In *Aberdeen*, a defendant brought a successful equal protection challenge against SDCL 9-19-4, a statute which delineated sentencing maximums for cities that had municipal courts while cities without municipal courts had a different, lesser maximum sentencing scheme. 233 N.W.2d at 332–33. The defendant was convicted for illegally

[4] An early case, *Behrns*, delineated two separate tests for enforcing Article VI, § 18 of the South Dakota Constitution. In the first test, the Court will invalidate statutes when it disagrees "with the class lines drawn by the legislature." 229 N.W.2d at 89. Class distinctions must be "clearly and wisely drawn," not cause arbitrary distinctions between people in "substantially the same situation," and any discrimination between people "must rest upon some reasonable ground of difference." *Id.* This test

> [i]s not a substitution of the court's judgment for that of the legislature regarding the wisdom of the statutory purpose – it is an examination by this court to ensure that the persons affected by a statute are those that should be reached to achieve the desired legislative ends. Where, however, the line between those touching the problem to be remedied and those having no relation to the problem is not easily discernible, we have indicated we will not disturb the legislature's classification.

Id. The Court will also enforce Art. VI § 18 by requiring that the challenged act "accomplish[es] what is claimed for it." *Id.* This test is based on reasonableness, requiring that the classification scheme at issue "not be palpably and obviously in vain . . . for to classify persons without a chance of result is to classify arbitrarily and without purpose in violation of the very spirit of Art. VI, § 18." *Id.* This language appears to be more stringent and much less popular than the two-part test.

operating a junkyard without a permit in a county with a municipal court, therefore receiving a greater sentence. *Id.* Using the two-part test, the South Dakota Supreme Court struck down the statute. Under the first prong, the Court found that the inequality created by the statute was "completely arbitrary and capricious." *Id.* at 333. The Court then looked to whether there was a rational relationship between the distinctions outlined for counties with municipal courts versus those without and found none. *Id.* at 333–34.

The South Dakota Supreme Court does not always proceed through the full equal protection analysis if the statute survives the first prong. In *Sedlacek*, a plaintiff challenged the statutory exception allowing for sex-segregated activities as unconstitutional under equal protection grounds after she was prevented from participating in a boys-only baseball tournament. 427 N.W.2d at 867. While the trial court looked at the relevant parts of the statutory exception in isolation and found them to be unconstitutional, the Supreme Court viewed the statutory exception in its entirety, and found the legislature intended to preserve historically active sex-segregated programs. *Id.* at 869. The Court found that in reading the exception as a whole, the classifications created by the statute were not arbitrary, therefore meeting the first prong of the equal protection test. *Id.* The Court then held that because the statutory exception survived the first prong by not setting up an arbitrary classification, they did not need to decide what the proper test was for the second prong of the equal protection inquiry. *Id.* The statute was held constitutional on the first prong alone. *Id.*

Further reading of the case law shows that there has been activity in striking down regular legislative categorizations that have no special constitutional status. In *Lyons*, a plaintiff filed a products liability action against two medical companies, and a medical malpractice action against the doctor who prescribed him tetracycline numerous times as a child, which the plaintiff

alleged discolored his teeth. 440 N.W.2d at 769–70. His medical malpractice claims were dismissed at summary judgment as barred under SDCL 15-2-22.1, which restricted the statute of limitations for minors bringing medical malpractice claims if the alleged malpractice occurred while they were under the age of six (as was the case for the plaintiff). *Id.* at 770. The plaintiff challenged as an alternative that SDCL 15-2-22.1 was violative of the equal protection clause. *Id.* On the first prong, the Court found that the statute did not apply equally to all people, and instead created an arbitrary classification that distinguished minors who brought medical malpractice causes of action from minors bringing any other kind of tort claim. *Id.* at 771. The plaintiff's case exemplified the arbitrariness of this distinction: his medical malpractice claim against the doctor was barred, while the product liability action was able to proceed. *Id.* Upon reaching the test's second prong, the Court failed to find any rational basis for the distinction. *Id.* While acknowledging a historical crisis of medical malpractice claims that had perhaps influenced this statute, the Court maintained that there was no rational reason for distinguishing a statute of limitations based on arbitrary age differences, and that it was unlikely medical malpractice claims will diminish "simply by requiring that suits be instituted at an earlier date." *Id.* The statute was held unconstitutional. *Id.* at 772.

However, courts do not always strike down categorizations. In *Krahwinkel*, a defendant challenged his conviction for driving a truck that exceeded the Interstate Highway System's gross weight limits. 2002 SD at ¶¶ 1–2, 656 N.W.2d at 455–56. The defendant argued, among other claims, that the overweight provisions outlined in South Dakota motor vehicle statutes were facially unconstitutional under the federal equal protection clause and Article VI, ¶ 18 because they delineated unequal penalties for identical violations. *Id.* at ¶ 12, 656 N.W.2d at 458. Under the first prong of the *Aberdeen* test, the Court examined whether the overweight truck

statutes set up arbitrary classifications between citizens. *Id.* The defendant argued that the statutory scheme's classifications were arbitrary because the Legislature made distinctions between the types of truckloads, nature of certain vehicles, and kinds of vehicles receiving permits, but these distinctions did not serve the stated statutory purpose of protecting roads from weight damage. *Id.* at ¶ 20, 656 N.W.2d at 460. The Court disagreed, noting that equal protection "requires that the rights of every person be governed by the same rule of law, *under similar circumstances*." *Id.* at ¶ 21, 656 N.W.2d at 460. The statutes at issue fulfilled this by applying equally to those similarly situated: one statute applied equally to all vehicle operators with permits for overweight loads, and the other applied equally to all vehicle operators without a permit; therefore, the classifications were not arbitrary. *Id.* at ¶¶ 21–23, 656 N.W.2d at 461. In analyzing the second prong of the test, the Court found there was a rational relationship between the different weight classifications, which provided exemptions for certain industries, and a legislative purpose. *Id.* at ¶ 23, 656 N.W.2d at 461. Agricultural vehicles received certain exemptions because of "the importance of agriculture to the general welfare," a "substantial sector of commerce in South Dakota." *Id.* at ¶ 24, 656 N.W.2d at 461. Similarly, weight exemptions for emergency vehicles served a legitimate legislative purpose rationally related to public safety. *Id.* at ¶¶ 24–26, 656 N.W.2d at 461–62. The Court concluded that the overweight provisions were constitutional. *Id.* at ¶ 27*,* 656 N.W.2d at 462.

B. Very few South Dakota cases have received heightened scrutiny review.

Practically every equal protection case reviewed has either found that rational basis was the applicable level of scrutiny or disposed of the challenge on the first equal protection prong. *See Krahwinkel*, 2002 SD at ¶ 19, 656 N.W.2d at 460; *Lyons*, 440 N.W.2d at 771; *Cheyenne River Sioux Tribe Tel. Auth. v. PUC*, 1999 SD 60, ¶¶ 45–46, 595 N.W.2d 604, 613–14. However, South Dakota courts recognize that there are different levels of scrutiny that can be applied for an

equal protection test. *See, e.g.*, *Davis*, 2004 SD at ¶ 9, 681 N.W.2d at 455 ("A strict reading of [the Privileges and Immunities Clause] is limited to matters involving suspect classes or fundamental rights."). The Court uses the traditional three levels of scrutiny for both federal and state levels: strict scrutiny for fundamental rights or suspect classes, intermediate or substantial relation test for legitimacy and gender, and rational basis for all other classes. *Lyons*, 440 N.W.2d at 771; *see also Krahwinkel*, 2002 SD at ¶ 19, 656 N.W.2d at 460 ("The statutes [at issue] do not encompass a fundamental right, a suspect classification, or an intermediate scrutiny classification; thus, the rational basis test is applicable.").[5]

There are very few cases in which the South Dakota Supreme Court has applied heightened scrutiny. However, since the Court so often blends federal and state law, it's likely that where heightened scrutiny would improve our argument, we can use federal cases and cite to the use of federal standards in other South Dakota cases to argue that the standard should at least be the same, if not more stringent.

We identified four South Dakota Supreme Court cases that explicitly explored and in some instances seemed to apply intermediate scrutiny in an equal protection challenge. From these cases, it appears the South Dakota courts apply a heightened scrutiny test in this manner: the Court's inquiry "does not focus on the abstract 'fairness' of the statute, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment." *In re Estate of Erbe*, 457 N.W.2d 867, 870 (S.D. 1990). The Court will assess whether the statute at issue is "substantially related to

[5] Sometimes, the Court will determine the proper level of scrutiny before engaging in the two-part test. *See Krahwinkel*, 2002 SD at ¶¶ 19–21, 656 N.W.2d at 460–61 (determining the appropriate level of scrutiny is rational basis and then proceeding with the two-prong test); *Cheyenne River Sioux Tribe Tel. Auth.*, 1999 SD at ¶ 45, 595 N.W.2d at 613 (same); *Lyons,* N.W.2d at 771 (addressing Lyons's arguments that age classifications should be subject to intermediate scrutiny before analyzing under the two-part test). But the Court will also sometimes start the two-prong analysis and then turn to the issue of scrutiny after the analyzing the first prong. *See Sedlacek*, 437 N.W.2d at 868–69.

permissible state interests." *Id.* at 869; *Dep't of Soc. Servs. ex rel. Wright v. Beyer*, 2004 SD 41, ¶ 13, 678 N.W.2d 586, 590 ("To comply with the equal protection guarantees, the classification must be substantially related to an important governmental objective."); *Weegar v. Bakeberg*, 527 N.W.2d 676, 678 (S.D. 1995) (striking down statute not substantially related to the state's interests). The statute "must bear some rational relationship to legitimate state purposes" for it to be constitutional. *Erbe*, 457 N.W.2d at 869.

Erbe dealt with an inheritance claim brought by an illegitimate child. *Id.* at 868. The son sought a portion of the inheritance from his presumed father but did not satisfy the requirements of a South Dakota state statute governing the right of an illegitimate child to inherit from their father provided one of the available statutory procedures proving parentage was followed. *Id.* In assessing the statute's constitutionality, the South Dakota Supreme Court began with an acknowledgement that "classifications based on illegitimacy, while not being subject to 'strict scrutiny,' must be substantially related to permissible state interests," and "must bear some rational relationship to legitimate state purposes." *Id.* at 869 (citing *Lalli v. Lalli*, 439 U.S. 259 (1978), and then *Trimble v. Gordon*, 430 U.S. 782 (1977)). The Court noted that the United States Supreme Court has recognized legitimate state interests relating to inheritance (such as the efficient administration of a decedent's estate and avoiding fake inheritance claims), and these state interests apply to the statute in question. *Id.* at 869–70. Given the statute both serves legitimate state interests and provides a way for an illegitimate child to inherit from their father, the Court concluded that the law did not violate equal protection principles. *Id.* at 870.[6]

[6] Notably, the dissent in *Erbe* thought the statute was unconstitutional. *Id.* at 871 (Wuest, C.J., dissenting). For statutes differentiating on the basis of illegitimacy, "we must ascertain whether the statutory classification bears some rational relationship to a legitimate state purpose," as well as examine "whether the statute in question is 'carefully tuned to alternative considerations.'" *Id.* (Wuest, C.J., dissenting) (quoting *Trimble*, 430 U.S. at 772). The statute at issue, according to Chief Justice Wuest, did not bear a rational relationship to the state's interest in orderly descent of property, nor was it to tuned to other considerations. *Id.* (Wuest, C.J., dissenting).

In *Wright*, the South Dakota Supreme Court held that a statutory framework limiting the amount of time to commence a paternity action for children who had presumed fathers to sixty days violated the equal protection clauses of both the South Dakota and United States Constitutions.[7] 2004 SD at ¶ 1, 678 N.W.2d at 587. In its analysis, the Court reviewed *Clark v. Jeter*, a United States Supreme Court case that applied the intermediate scrutiny standard to determine that a paternity statute with a six-year statute of limitation was violative of equal protection, and found the reasons animating *Clark* and a similar Montana state decision were applicable to the case at issue. *Id.* at ¶¶ 8–13, 678 N.W.2d at 589–90. Here, a biological father was able to avoid child support obligations because the child in question had a presumed father and therefore was barred from commencing a paternity action after sixty days, whereas paternity actions in which the child did not have a presumed father had no such bar. *Id.* at ¶ 14, 678 N.W.2d at 590. The Court, while noting the "vital government interest" of "safeguarding children's rights to support," found the statute "discriminatory on its face." *Id.* The Court did not explicitly say the level of scrutiny applicable for the case at issue, but given the Court relied on cases that used an intermediate scrutiny standard, it appears a similar standard was used here.

Two additional cases involved heightened scrutiny tests in the context of paternity actions. *State ex rel. Hove v. Doese*, 501 N.W.2d 366, 371 (S.D. 1993), acknowledged that equal protection claims against statutes of limitation for paternity actions receive heightened scrutiny, specifically citing to the scrutiny test announced in *Clark*. However, the Court ultimately determined that the parties had waived their equal protection claims. *Id.* at 368. The case was decided in favor of the alleged father on the grounds that new legislation expanding South

[7] The Court in *Wright* investigated the equal protection issue *sua sponte*, noting that "[i]n a case like this, it is vitally important" that the constitutionality of the statutes be addressed, given "[c]hild support is just such a vital concern." *Id.* at ¶ 15, 678 N.W.2d at 590.

Dakota statutes of limitation for establishing paternity actions was not retroactive and did not revive a cause of action that was previously barred by the statute of limitations. *Id.* at 371.

Finally, *Weegar* presents a successful equal protection challenge on heightened scrutiny grounds. 527 N.W.2d at 676. A mother brought an action to establish paternity against a putative father living out of state; the trial court dismissed because the action commenced after South Dakota's two-year statute of limitations on establishing paternity. *Id.* at 676–77.[8] The South Dakota Supreme Court first looked at United States Supreme Court cases *Mills v. Halbuetzel* and *Clark*, which applied intermediate scrutiny to knock down one-year and six-year statutes of limitation on paternity actions, and reviewed the *Clark* language on intermediate scrutiny and paternity actions. *Id.* at 677–78. The Court then held that the two-year statute of limitation was not sufficiently long enough to provide "reasonable opportunity" to bring a paternity action, and given the South Dakota Legislature had expanded its own statute of limitations on paternity actions, the limitation at issue here was "not substantially related to the state's interest in avoiding stale or fraudulent claims." *Id.* at 677 (quoting *Clark v. Jeter*, 486 U.S. 456, 462 (1988)). The two-year statute of limitation therefore "fail[ed] the intermediate scrutiny test." *Id.*[9]

The above cases confirm that intermediate scrutiny is applied to certain issues and give some indication as to how South Dakota courts may apply an intermediate scrutiny test. One could argue that this test is applicable to cases involving subjects implicating fundamental rights and vital state interests, like the law we seek to challenge. The language the Court has used to discuss intermediate scrutiny was not explicitly limited to paternity. Given the Court has

[8] While South Dakota had since expanded the time period on its statute of limitations, the issue at stake in *Weegar* was whether the two-year limitation version of the statute, which applied to this case, was constitutional. *Id.* at 677.
[9] Notably, Chief Justice Wuest, who had dissented in *Doese* and *Erbe* on the grounds that the child's equal protection claim should succeed, see *supra* n. 6, wrote the majority opinion in *Weegar*, indicating his view on equal protection applicability to this issue ultimately prevailed.

recognized that challenges involving fundamental rights and vital state interests warrant a higher level of scrutiny than rational basis, perhaps an intermediate scrutiny test could apply to the state laws we wish to challenge.

However, the South Dakota cases that received intermediate scrutiny all deal with paternity disputes, and these cases do not necessarily indicate whether a South Dakota court would apply heightened scrutiny for cases that do not involve parentage issues.[10] It is possible the South Dakota Supreme Court simply follows United States Supreme Court precedent of giving heightened scrutiny for this subject matter. *See Clark*, 486 U.S. at 461–62 (noting the Court's "particular framework for evaluating equal protection challenges to statutes of limitation that apply to suits to establish paternity"); *Mills v. Habluetzel*, 456 U.S. 91, 98–99 (1982) (similar). The South Dakota heightened scrutiny cases do not inherently suggest that South Dakota courts will apply heightened scrutiny to issues that fall outside the narrow paternity sphere. And given almost all the equal protection cases surveyed used rational basis review, perhaps a South Dakota court would only use heightened scrutiny for a protected class or fundamental right that the United States Supreme Court explicitly says requires a heightened scrutiny test.

Conclusion

In reported caselaw, South Dakota state courts have sometimes, though not often, found a statute unconstitutional either as applied or facially in an equal protection context.

[10] The statute the organizational client sought to challenge did not involve issues of paternity or parentage.

Applicant Details

First Name	**Nataniel**
Last Name	**Tsai**
Citizenship Status	**U. S. Citizen**
Email Address	**nytsai@pennlaw.upenn.edu**
Address	**Address** Street **2308 Lombard Street, 5** City **Philadelphia** State/Territory **Pennsylvania** Zip **19146** Country **United States**
Contact Phone Number	**6025820988**

Applicant Education

BA/BS From	**University of Arizona**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Ferzan, Kimberly
kferzan@law.upenn.edu
215-573-6492

Burch, Holly
Holly.Burch@dea.gov
(202) 251-3712

Kaufman, Paul
Paul.Kaufman2@usdoj.gov
2153708774

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nataniel Y. Tsai
(602) 582-0988 | 2308 Lombard Street, Philadelphia, Pennsylvania 19146 | nytsai@pennlaw.upenn.edu

June 12, 2023

The Honorable Juan Ramon Sánchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse, Room 14613
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am writing to be considered for a clerkship position for the 2024-2026 term. I am a rising 3L student at the University of Pennsylvania Carey Law School.

I have really enjoyed my time in Philadelphia and would be privileged to continue my legal education in the city where it began. I like to think of myself as a pragmatic problem-solver who excels in a fast-paced environment, and the District Court of the Eastern District of Pennsylvania would be an excellent place for me to further my legal experience. I am interested in clerking in the district court to understand further how facts are interpreted by the Court and used to come to the correct legal conclusion.

My time on the Penn Law Review has refined my attention to detail and taught me to think critically while editing complicated topics. My pursuit of a Master of Bioethics, as well as my experiences growing up in a multiethnic household, have helped to frame how I think about the law by providing me with different perspectives to work through complex problems and approach issues with humility and an understanding that the parties involved might have different values and priorities than me.

Enclosed are my resume, transcript, and writing sample. My letters of recommendation from Professor Paul Kaufman (paul.kaufman2@usdoj.gov, 856-757-5230), Professor Kimberly Ferzan (kferzan@law.upenn.edu, 215-573-6492), and Holly Burch, Esq. (Holly.Burch@dea.gov, 571-776-3232) are also included [will follow under separate cover]. Please let me know if there is any additional information I can provide.

Sincerely,

Nataniel Y. Tsai
Encls.

Nataniel Y. Tsai

(602) 582-0988 | 2308 Lombard Street, Philadelphia, Pennsylvania 19146 | nytsai@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Carey Law School, Philadelphia, PA
Juris Doctor, Expected May 2024

- Development Editor of *University of Pennsylvania Law Review* 2023-2024
- Associate Editor of *University of Pennsylvania Law Review* 2022-2023
- Comment: Medicare Part D Negotiations: Meaningful Change or A Step in the Right Direction?
- Equity and Inclusion Fellow for the Penn Law Office of Diversity and Inclusion
- LALSA (Latinx Affinity Group) – Vice-President 2022-2023, 1L Representative

University of Pennsylvania Perelman School of Medicine, Philadelphia, PA
Master of Bioethics, Expected May 2024

University of Arizona, Tucson, AZ
Bachelor of Science in Public Health with Honors, summa cum laude, Outstanding Senior, August 2017 – May 2021
Bachelor of Arts in Political Science, summa cum laude

- Senior Thesis: Legal Challenges to State Regulation of Pharmacy Benefit Managers

WORK EXPERIENCE

Arnold & Porter, Washington DC
Summer Associate, Summer 2023

- Performed research and wrote a memo in support of a pro bono FOIA litigation matter
- Conducted research into the legislative history regarding an ambiguous term pertaining to Medicaid

Department of Justice, Arlington, VA
Intern for Chief Counsel for the Drug Enforcement Administration, May 2022-August 2022

- Prepared charging and prosecution documents related to the revocation of a healthcare provider's license to prescribe controlled substances
- Directed and cross-examined special agents in training during moot court exercise at Quantico
- Drafted a brief in support of the administration relating to an employment discrimination case

Philadelphia Legal Aid, Philadelphia, PA
Intern with Medical Legal Community Partnership Unit, January 2022-May 2023

- Researched legal questions regarding public benefits
- Advised clients as to how their immigration status would affect their access to healthcare

University of Arizona Campus Health, Tucson, AZ
Health Promotion Intern/Student Worker, August 2020-May 2021

- Educated students about various health topics, transcribed patient data and observed patients' reactions to the COVID-19 vaccine

Arizona Third Congressional District, Tucson, AZ
Office Intern, January 2020-March 2020

- Answered constituent's questions regarding issues with federal agencies, particularly regarding immigration

University of Arizona Honors Alternative Spring Break, Nogales, AZ and Sonora, Mexico
Trip Leader, May 2019-May 2020

- Co-designed and co-led a week-long trip centered on immigration and border issues
- Collaborated with non-profit groups to create volunteer opportunities; fundraised; responsible for ten participants for trip duration

LANGUAGE & INTERESTS

Language: Spanish (professional working proficiency)
Interests: Cooking (primarily Chinese, Mexican, and Thai food,), sports (Liverpool F.C., Arizona Cardinals, Dallas Cowboys, University of Arizona teams), and traveling (in particular around the United States, Latin America, and Asia)

Nataniel Tsai
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Spring 2023

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure: Trial and Adjudication	The Hon. Stephanos Bibas	A-	3	
Health Insurance Reform and Regulation	Allison Hoffman	A-	3	
Federal Indian Law	Catherine Struve	A-	3	
Law Review	Elizabeth Pollman	Ungraded	1	

Fall 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Antitrust	Herbert Hovenkamp	A	3	
Evidence	Kimberly Ferzan	A-	4	
Healthcare Fraud: Investigation and Prosecution	Paul Kaufman	A-	3	
Women, Law, and Leadership	Rangita de Silva de Alwis	A	3	

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Sophia Lee	A-	3	
Criminal Law	Sean Ossei-Owusu	B	4	
Constitutional Law	Kermit Roosevelt	B+	4	
Plagues Pandemics and Public Health Law	Eric Feldman	B+	3	
Legal Practice Skills	Jessica Simon	Passed	3	

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Yanbai Andrea Wang	A-	4	
Contracts	David Hoffman	B	4	
Torts	Karen Tani	B+	4	
Legal Practice Skills Cohort	Eric Makarov	Passed	1	
Legal Practice Skills	Jessica Simon	Passed	3	

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Nataniel Tsai

Dear Judge Sanchez:

I am delighted to recommend Nataniel Tsai for a clerkship. Nataniel was a student in my Evidence class, wherein he received an A-. Nataniel is a bright and tenacious student who will be an exemplary law clerk.

Academically, Nataniel is a terrific student. I teach my Evidence course with two case files, where students represent two clients for the entire semester, and they complete problems based on those case files. Not only was Nataniel consistently engaged and prepared in class but he would also drop in on office hours when he had a question. He was not a constant attendee, but rather, would triage his questions so as to focus on particularly complex issues. In general, it was clear that Nataniel tried to figure things out and would come to office hours when he had really put in the work to master the material.

His exam was very strong. My Evidence class was very gifted, with a significant number of Law Review students. In a crowded field, Nataniel still performed above the mean, demonstrating significant mastery of the material as well as the ability to write clearly under significant time pressure.

Interpersonally, Nataniel is quiet, unassuming, and thoughtful. But he is also tenacious. Not only does he love to be challenged in classes but he enjoys throwing himself into material so that he can learn and master topics. He enjoyed law review specifically because it pushed him to become a stronger writer. Ultimately, I would expect him to work well independently, to be willing to take on the most challenging of research questions, and to respond well to feedback and criticism. He will be an ideal law clerk.

I recommend Nataniel wholeheartedly. Please do not hesitate to contact me if you have any questions about his candidacy.

Sincerely,

Kimberly Kessler Ferzan
Earle Hepburn Professor of Law
kferzan@law.upenn.eud
215-573-6492

U. S. Department of Justice
Drug Enforcement Administration
Office of Chief Counsel

www.dea.gov

March 21, 2023

Dear Judge:

It is with great pleasure that I recommend Nataniel Tsai for an attorney position with your court. Nataniel joined the Drug Enforcement Administration (DEA) for his 1L summer internship during which I was his direct supervisor. DEA could not have made a better choice than to have Nataniel as one of three interns for its 2022 internship class.

Naturally soft-spoken, Nataniel balanced the class with grace, humility, and an unexpected humor. His goals while with the DEA were to improve his legal research & writing and confidence; without question, he grew by leaps and bounds in these areas during his time at the DEA. From working on an Order to Show Cause to remove a doctor's license, to drafting agency-wide guidance on the Hatch Act, to drafting the Agency's Brief in an EEO appeal, he was always willing – and seeking – to try new work, and was happy to do any work that needed to be done. As part of a small, three-person intern team, he was integral to the success of the team, balancing his individual projects with the team's projects, whether team lead or member. He flew through assignments, working on both quick turn-around and long-term projects, always making sure to seek out guidance and feedback, as appropriate. Not only did he reach out to the attorneys he worked with for constructive criticism on his projects, but he also sought assistance on citations and memo drafting from our litigation experts. Nataniel showed a strong work ethic and dedication to his internship, often taking on numerous projects at the same time, completing them in an appropriate timeframe, and asking pertinent questions when necessary.

Nataniel demonstrated excellent professionalism, drive, and accountability during his time at the DEA. I have stayed in touch with Nataniel since his summer with DEA and continue to believe that not only is going to be a wonderful lawyer one day soon, he is already an amazing person. Any legal office would be exceedingly lucky to have Nataniel join them. I hope that office is yours.

It is with great confidence and excitement that I recommend Nataniel to your office. Nataniel's intelligence, legal skills, professionalism, and pure drive to succeed will not disappoint should you give him the opportunity. Thank you for the opportunity to recommend Nataniel. Please feel free to contact me at holly.burch@dea.gov or 202-251-3712 should you wish to discuss anything further.

Sincerely,
/s/

Holly M. Burch
Senior Attorney, Foreign Section / Intern & Honors Program Director
Office of Chief Counsel
Drug Enforcement Administration

U.S. Department of Justice

United States Attorney
Eastern District of Pennsylvania

June 10, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Nataniel Tsai

Dear Judge Sanchez:

I write in recommendation of Nataniel Tsai for a clerkship with your court. I got to know Nathaniel through my class, Health Care Fraud: Investigation and Prosecution, at the University of Pennsylvania Carey Law School.

My class is a bit unusual, but I believe it gives me a valuable perspective on how Nathaniel thinks and reasons. The class covers a variety of detailed topics, including the civil False Claims Act, Stark Law, and Anti-Kickback Statute, federal crimes ranging from Wire Fraud and False Statements to Misbranding, and investigative techniques from consensual interviews to Title III wiretaps. It is an intense, practically-oriented instruction, and it requires a precise delineation of complex and ambiguous legal subjects (materiality in the False Claims Act arena after the Escobar, scienter for violations of the Anti-Kickback Statute, and so forth) applied to factual contexts from solo physician offices to pharmaceutical corporations. The examination is a highly-compressed, three-hour sprint that forces students into the role of AUSAs and defense counsel analyzing ambiguous, challenging fact patterns on both the practical and legal levels.

That Nathaniel scored as he did on that exam is a testament to him and to his ability to reason through complex legal scenarios. The statutes I teach are among the trickiest in law, and their intersection makes the questions I ask exponentially more so. I was impressed with Nathaniel's performance and the mind and work that led to it. In addition, Nathaniel was required to present on a topic of his choice, and so I was able to observe him with his peers and even able to borrow a small component of his presentation on opiate fraud for my exam.

Since my class ended, I have also gotten to know Nathaniel better as a person. He is a delightful, laid-back law student whose chill demeanor belies an intense desire to improve himself as an attorney, one who is willing to take on serious intellectual challenges if it means reaching a better level of understanding. Despite his intellect, Nathaniel is humble, plain-spoken, honest, and grounded. He would make a fine addition to any Chambers, and you could rest assured knowing that he would be a part of the team, bereft of the arrogance, pig-headedness, or plain cussedness that can taint the Chambers dynamic or affect the courthouse family. People like Nathaniel, and with good reason.

If you have any additional questions or would like to discuss this matter further, please do not hesitate to contact me or to have someone from your Chambers do so. I am always happy to see good people find one another, and I know that Nathaniel will make a real contribution wherever he lands, bringing a great deal to the table without taking anything off of it.

Respectfully,

PAUL W. KAUFMAN
Assistant United States Attorney
Adjunct Professor
University of Pennsylvania Law School
Email: paul.kaufman2@usdoj.gov
Tel: 215-861-8618

Writing Sample

I drafted the attached writing sample as an assignment for my 1L summer internship at the Drug Enforcement Administration's Office of Chief Counsel. The assignment required drafting a brief in response to a complaint of discrimination and a hostile work environment filed by a current employee of the administration. I conducted all the research necessary for the assignment. I received broad feedback from my supervising attorney for the brief and then submitted my draft to my supervising attorney. I have received permission to use my draft of the brief as a writing sample for clerkship applications in its current redacted form.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS

[redacted],	)	
	)	
Complainant,	)	
	)	[redacted]
v.	)	
	)	
MERRICK GARLAND,	)	
ATTORNEY GENERAL,	)	
U.S. DEPARTMENT OF JUSTICE	)	
	)	[redacted]
Agency.	)	
_____	)	

AGENCY'S OPPOSITION TO
COMPLAINANT'S APPEAL OF FINAL AGENCY DECISION

The United States Department of Justice, Drug Enforcement Administration ("DEA" or "the Agency"), submits this opposition to Complainant [redacted] Appeal of the Final Agency Decision ("FAD"). As stated herein, the FAD should be affirmed.

PROCEDURAL BACKGROUND

[redacted] ("Complainant") alleges that she was discriminated against on the basis of her sex (female) and race (African American). FAD at 1. Specifically, the allegations accepted for investigation were whether such discrimination occurred when:

1. [O]n October 27, 2020, she received an overall rating of "Successful" on her annual performance evaluation;

2. [O]n undetermined dates, the Group Supervisor required her to submit written operational plans and to notify other agents before conducting an operation, thereby holding her to a different performance standard than her white coworkers; and

3. [W]hen the Group Supervisor subjected her to a hostile work environment by following her around the work place and asking her coworkers about her personal life.

Id. Complainant did not request a hearing before an Administrative Judge. Accordingly, the case was presented to the Complaint Adjudication Office ("CAO") for a FAD. In its decision issued on April 7, 2022, the CAO found that "the record fails to demonstrate that complainant was subjected to disparate treatment or a hostile work environment based on her race or sex." *Id.* at 11.

Complainant noticed this appeal on May 5, 2022, and submitted her brief on June 6, 2022.

FACTUAL BACKGROUND

Complainant is a Special Agent ("SA") in the DEA's [redacted] Field Division Office. Report of Investigation ("ROI") at 61-62. Her first line supervisor was Group Supervisor ("GS") [redacted]. *Id.* at 62. GS [redacted] was Complainant's first-line supervisor from August 2019 until May 2020. *Id.* at 104. On or about October 27, 2020, Complainant received a performance evaluation rating of "Successful" for October 1, 2019, to May 23, 2020, with GS [redacted] as the rating official. *Id.* at 4, 105, 228. Acting GS [redacted] was Complainant's rating official from May 24, 2020, until June 20, 2020, following her transfer; however, since he did not supervise her for at least the required 90 days, he did not provide her with a rating. *Id.* at 227. From the period of June 21, 2020, until September 30, 2020, Complainant was rated by GS [redacted] who gave Complainant a rating of "Excellent." *Id.* at 145, 220. Complainant's overall rating for October 1, 2019, through September 30, 2020, was determined by using a formula that combined her interim rating from GS [redacted] with the rating GS [redacted] provided, which equated to an overall "Successful" rating. *Id.* at 145, 226. Complainant did not agree with the rating, as she believed that she deserved a higher rating. *Id.* at 65. Complainant then

discussed her rating with Assistant Special Agent in Charge ("ASAC") [redacted] who concurred with both GS [redacted] rating and the overall final rating. *Id.* at 129-130.

Complainant also claims that GS [redacted] required that Complainant send her operational plans to the rest of the team while not requiring the same for Complainant's white coworkers. *Id.* at 69-70. However, Complainant also admitted that written operational plans are required when an SA is conducting an operation. *Id.* at 69.

Complainant also alleges that GS [redacted] fostered a hostile work environment by following her throughout the building and that she would see GS [redacted] on the second floor when he had no reason to be there. *Id.* at 72-73. GS [redacted] denied the allegations, stating that he has meetings throughout the different floors of the building, and Complainant would not know his schedule and where he needed to be. *Id.* at 113. Complainant asserts that GS [redacted] inquired about her personal life when he asked her about her relationship to her fiancé at the time and that, at times, GS [redacted] would refer to Complainant and other female members of the group as "girls." *Id.* at 72, 73, 77. GS [redacted] stated that, at times, he did ask about Complainant's personal life, as he was concerned about her because she was not acting herself at work, and when he tried to refer her to the Employee Assistance Program, advised her that she could talk to the Division Pastor, and that any group member and himself were available if she needed anything, Complainant declined any assistance. *Id.* at 114. GS [redacted] does not recall referring to Complainant or other female members of the group as "girl." *Id.* at 115. On May 24, 2020, Complainant and GS [redacted] were reassigned to different units as part of a larger reorganization effort by Special Agent in Charge ("SAC") [redacted] due to the needs of the division, which included 28 staff transfers. *Id.* at 163.

ARGUMENT

As this is an appeal from a decision issued without a hearing pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to *de novo* review. 29 C.F.R. § 1614.405(a); *see* Equal Employment Opportunity Management Directive 110, Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the *de novo* standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that it "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and… issue its decision based on [its] own assessment of the record and its interpretation of the law.").

The Agency maintains that application of the *de novo* standard of review will yield the same conclusion – Complainant was not subject to discrimination or a hostile work environment. Though Complainant continues to make a number of different claims, they almost all contain no citations to the record. *See generally* Complainant's Brief in Support of Appeal (hereinafter, "Complainant's Brief"). Complainant also requests that, as one of her proposed remedies, the Agency grant Complainant's transfer to [redacted]. *Id.* at 14. However, since the request to transfer was not an issue in the initial complaint or anywhere discussed in the ROI, it is not a remedy that can be granted through this adjudication. ROI at 9, 15, 76, 77.

The CAO's legal analysis is sound, and the FAD should be affirmed in its entirety.

I. October 2020 Performance Appraisal

As set forth in the FAD, Complainant does not establish a *prima facie* case of discrimination and/or hostile work environment. In order to establish a *prima facie* case of disparate treatment, the Complainant must demonstrate that she suffered a materially adverse employment action because of her race or her sex under circumstances that raise an inference of

discrimination. *Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002); *see also Texas Dep't of Comm. Aff. v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Complainant fails to demonstrate that GS [redacted] treated other similarly-situated employees who are not a part of Complainant's protected classes differently. Specifically, in this case, SA [redacted], a white male, also received a "Successful" rating for the same time period as Complainant from GS [redacted]. ROI at 65, 132. Because of this, Complainant cannot show an inference of discrimination, since Complainant was not treated differently than those outside of her protected class. *See generally Young v. Henderson*, EEOC Doc. 03A00083, *1 (May 5, 2000) (stating that a *prima facie* case of disparate treatment discrimination requires the complainant to show that she was treated differently than similarly situated persons who are not members of her protected class). Even though Complainant states that she deserved a higher rating than SA [redacted], there is no evidence in the record to support Complainant's subjective and conclusory statement. *Id.* at 66-68. The fact that Complainant's coworkers perceive her to be a lead performer is irrelevant because Complainant's coworkers are not Complainant's supervisor and, as such, are not in charge of rating her performance; that responsibility is given to Complainant's first- and second-line supervisors. *Id.* at 220-33; Complainant's Brief at 6. Further, even if Complainant could show that her performance was superior to SA [redacted], she would still need to establish that the rating was related to her protected classes, which she has not done.

Even assuming that the record establishes a *prima facie* case of discrimination, Complainant's claim ultimately fails because DEA management articulated legitimate, non-discriminatory reasons for issuing Complainant a "Successful" rating on her FY 2020 performance appraisal. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) (noting

that the "ultimate burden" of persuasion remains "at all times" with the complainant). GS [redacted] stated that he did not take into consideration Complainant's sex and/or race when he formulated Complainant's rating. ROI at 109. GS [redacted] stated that he rated her performance "fairly and accurately" based on the performance standards in her performance work plan. *Id.* at 107-08. Also, GS [redacted] only issued Complainant her interim rating, not her overall rating, as her overall rating was determined through a formula combining GS [redacted] and GS [redacted] rating of Complainant. *Id.* at 107, 226.

ASAC [redacted], Complainant's second-line supervisor at the relevant time, explained that Complainant's sex and race had no bearing on the rating. *Id.* at 131. ASAC [redacted] noted that several of the accomplishments Complainant used to support her argument that she deserved a higher rating involved participation in other agents' operations, rather than operations she generated herself. *Id.* at 129, 130. ASAC [redacted] noted that many of Complainant's cases were spot checks, which do not justify GS-13 investigative work, and many of those cases demonstrated poor effort on the part of Complainant. *Id.* at 129. Nothing in the record supports a finding that these proffered reasons are pretext for discrimination. Even in Complainant's own brief she states "it is difficult to demonstrate with particularity why the Complainant's performance rating was inaccurate." Complainant's Brief at 7.

II. Application of Different Standards for Operations

The CAO was also correct in concluding that there is no evidence in the record to suggest that GS [redacted] had a different standard for Complainant than he did for other similarly-situated agents in his unit.[1] FAD at 9. GS [redacted] asserted that he did not require Complainant to notify

[1] The Agency notes that this allegation is untimely. GS [redacted] stopped being Complainant's supervisor in May 2020, and Complainant first contacted the EEO office on approximately November 19, 2020. ROI at 4, 104. This is well outside of the 45-day requirement to bring a discrimination claim. 29 C.F.R. § 1614.105(a)(1).

the team by email of every operation that she conducted. ROI at 111. Complainant cannot point to a single specific instance when GS [redacted] required her to notify the unit of an operation that she was undertaking, and there is no evidence in the record to suggest that GS Heigle ever did. *Id.* at 110, 111.

GS [redacted] stated that he did not have a higher standard for Complainant and provided an email that asked for operational plans from both Complainant and SA [redacted]. *Id.* at 120. No other DEA agent in the unit observed Complainant being held to a higher standard by GS [redacted]. *Id.* at 51-53. Complainant's only "evidence" of the unequal treatment she allegedly received is her own observations that there were instances when white agents would return from an operation and not inform anyone. *Id.* at 107. Complainant's alleged observations do not account for the fact that some operations are very time sensitive, and verbal operational plans may be used instead of written operational plans. *Id.* at 160. Complainant's own brief states that it would be difficult to draw a conclusion that she was held to a higher standard from the evidence contained within the record. Complainant's Brief at 4.

Even if it is assumed to be true that GS [redacted] did hold Complainant to a different standard regarding the submission of operational plans, the action is not an adverse employment action, thus negating one of the elements for a *prima facie* claim of race or sex discrimination. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761-62 (1998) (holding that for an adverse employment action there must be a tangible employment action that constitutes a significant change in employment status, "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"). Submitting an operational plan, something that Complainant admits is required for all enforcement operations, ROI at 69, does not rise anywhere near the level of a significant change

in employment status, and thus is not an adverse employment action.

III. Hostile Work Environment Claim

The CAO also correctly concluded that Complainant was not subject to a hostile work environment based on her race or sex.[2] *See Harris v. Forklift Sys.*, 510 U.S. 17, 21-23 (1993) (noting that to establish a case of discrimination on the basis of a hostile work environment, a complainant must first show that the agency acted with discriminatory animus against a protected group to which the complainant belongs). In order for Complainant to succeed on a hostile work environment claim, the alleged discrimination based on her race or sex must be severe or pervasive enough that a reasonable person would find the workplace to be hostile or abusive. *See generally Harris v. Forklift Sys.*, 510 U.S. 17 (1993); *see also* FAD at 7-8.

In response to Complainant's claim that GS [redacted] followed her throughout the building, GS [redacted] explained that he often went to the second floor to speak to other personnel on the floor. ROI at 113. There is no evidence in the record, other than Complainant's own suspicions, which suggest that GS [redacted] singled out Complainant with his movements throughout the office. The CAO in the FAD stated that there is nothing in the record to support that GS [redacted] movements were anything more than normal office conduct. FAD at 10. GS [redacted] attending meetings and traveling within the building to perform work related tasks certainly are not actions that a reasonable person would find hostile or abusive.

Complainant also stated that she felt as if GS [redacted] fostered a hostile work environment by asking questions relating to her personal life, yet there is no evidence in the record to suggest

[2] The Agency notes that Complainant's hostile work environment claim is likely untimely. Complainant first contacted the EEO office on approximately November 19, 2020. ROI at 4. However, she dates her allegation about GS [redacted] asking about her personal life to December 2019, and the remainder of her hostile work environment claims appear to be from when GS [redacted] was her supervisor. ROI at 72-77. Since GS [redacted] stopped being her supervisor in May 2020, the last incident constituting her allegation of harassment is well outside of the 45-day time limit to bring a hostile work environment claim. 29 C.F.R. § 1614.105(a).

that GS [redacted] asked these questions with the intention of harassing or interfering with Complainant's work or that they were related to Complainant's race or sex. ROI at 113, 114. These questions, which occurred a total of three times within a two-month span, are not enough to succeed on a claim of hostile work environment. FAD at 9-10; *see also* ROI at 73, 113, 114. In order for Complainant to prove a hostile work environment claim, "[s]imple teasing, offhand comments, and isolated incidents (unless extremely serious) do not amount to discriminatory changes in the terms or conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Three instances within two-months are nothing more than isolated incidents, and fail to rise to the level of extremely serious. GS [redacted] stated that he was concerned for Complainant, as she had been acting out of character while at the office. *Id.* at 113-14. A reasonable person would not think that her supervisor asking how her relationship is going because she seemed sad, or about her personal life in general, since she did not seem herself, would be abusive or pervasive enough to file a hostile work environment claim. ROI at 113-14, 189.

Complainant also alleges that GS [redacted] called Complainant and other females "girl" and often micromanaged their work. ROI at 57-58. Yet again, simple teasing, offhand comments, and isolated incidents are not sufficient for Complainant to succeed on a hostile work environment claim as EEO regulations are not a "general civility code." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998); *Faragher*, 524 U.S. at 788. Further, GS [redacted] stated that he does not recall referring to Complainant or other female members of his team as "girl." ROI at 115. No other witnesses in the ROI stated that they heard GS [redacted] refer to Complainant or other female members of the team as "girls." *See generally* ROI. Complainant in her brief states that the use of "girl" is a "Jim-Crow era microaggression." Complainant's Brief at 10. However, even if GS [redacted] had used the term toward Complainant, he stated that

there would not have been any racial animus. ROI at 115. This is evident by the fact that it is a common term that is used in his home state of [redacted] to refer to a young lady or female. *Id.* He was raised to use the term to mean younger lady, his mother still uses that term, and he uses it with his family as well to refer to his two adult daughters. *Id.* As such, even if the events occurred in the manner that Complainant has described them, there is no evidence that any of the actions performed or statements made by GS [redacted] were motivated by Complainant's race and/or sex and accordingly, Complainant cannot prove a *prima facie* case of hostile work environment. As such Complainant's allegations of hostile work environment must fail.

CONCLUSION

For the foregoing reasons, the Agency respectfully requests that the FAD issued on April 7, 2022, be affirmed in its entirety.

Applicant Details

First Name	**Sergio**
Last Name	**Valente**
Citizenship Status	**U. S. Citizen**
Email Address	**sergio@valentes.net**
Address	**Address** **Street** **2903 Sevyson Court** **City** **Palo Alto** **State/Territory** **California** **Zip** **94303** **Country** **United States**
Contact Phone Number	**6504402720**

Applicant Education

BA/BS From	**American University**
Date of BA/BS	**May 2020**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 17, 2023**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Stanford Journal of Civil Rights and Civil Liberties** **Stanford Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Kelman, Mark
mkelman@stanford.edu
(650) 723-4069

Zambrano, Diego
dzambrano@law.stanford.edu

Letter, Dean's
deansletter@law.stanford.edu
650-723-4455

Spaulding, Norman
nspaulding@law.stanford.edu
(650) 736-1854

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SERGIO VALENTE
2903 Sevyson Court, Palo Alto, CA 94303 | 650.440.2720 | sergio@valentes.net

June 12, 2023

The Honorable Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania.
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

I am a third-year student at Stanford Law School, and I write to apply for a clerkship in your chambers for the 2024-25 term. I am drawn to your chambers because of your background as a public defender. I interned for the federal public defender, and the experienced inspired me to publish a Note on the topic of the right to counsel in habeas proceedings (attached as a writing sample). I am interested in Philadelphia specifically as it is where my significant other will be for the 2024 term.

Enclosed please find my resume, references, law school transcript, and writing sample for your review. Professor Diego Zambrano, Professor Norm Spaulding, and Professor Mark Kelman are providing letters of recommendation in support of my application.

Thank you for your consideration. I would be honored to serve as your law clerk.

Sincerely,

Sergio Valente

SERGIO VALENTE

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EDUCATION

Stanford Law School Stanford, CA
J.D., expected June 2023
Honors: Kirkwood Moot Court Champion & Best Oralist; Gerald Gunther Prize for Outstanding Performance in Federal Courts; Highest Pro Bono Distinction
Publication: *An Overlooked Consequence: How* Shinn v. Ramirez *Paves the Way for New State Collateral Proceedings*, 75 STAN. L. REV. __ (forthcoming 2023)
Diego Zambrano, Mariah Mastrodimos & Sergio Valente, *The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, 98 N.Y.U. L. REV. ONLINE (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4238007
Journals: *Stanford Law Review* (Vol. 75: Senior Online Editor)
Stanford Journal of Civil Rights and Civil Liberties (Vol. 17: Senior Editor)
Activities: Project Clean Slate pro bono (Senior Leader); ePluribus (leader); The Ingram Inn of Court (Pupil)

American University, School of International Service Washington, DC
B.A., *summa cum laude*, International Studies and B.S. Economics, May 2020
Honors: School of International Service Dean's List (all eligible semesters)
Activities: AU Debate Society (President); AU UNICEF (Vice President; Cofounder); Supplemental Instructor

EXPERIENCE

District of Columbia Court of Appeals Washington, DC
Law Clerk to the Honorable Vijay Shanker August 2023 – August 2024

U.S. Department of Justice, Civil Division, Appellate Staff Washington, DC
Intern August – September 2022
- Authored first draft of D.C. Circuit brief on issues of standing, statutory interpretation, and the APA.
- Drafted research memos on issues of collateral estoppel based on *Chevron* step one holdings and appellate jurisdiction over agency remand orders.

O'Melveny & Myers LLP Washington, DC
Summer Associate June – July 2022
- Researched how plaintiffs' novel "bait-and-switch" antitrust theory intersected with existing doctrine and new legal scholarship to draft a memo assessing the client's exposure and best counterarguments.
- Interviewed mothers who had lost their children to police violence to weave their narratives into an amicus brief urging reform of qualified immunity standards.

Stanford Law School Stanford, CA
Research Assistant to Professor Norman Spaulding May 2022 – present
Research Assistant to Professor Diego Zambrano May 2021 – December 2022

Office of the Federal Public Defender for the Middle District of Tennessee Nashville, TN
Intern, Capital Habeas Unit June – August 2021
- Authored persuasive memo on a statutory interpretation issue of first impression.
- Drafted conviction review petition based on evidence of police misconduct from previous cases.

Santa Clara Superior Court, Family Court Division San Jose, CA
Judicial Intern to the Honorable Thomas Kuhnle June – August 2020
- Prepared memoranda and draft opinions including spousal support and vexatious litigant determinations.

ADDITIONAL INFORMATION

Skills: Italian (fluent)
Interests: Visiting the zoo, playing strategic board games, and going for long walks in new areas

SERGIO VALENTE

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RECOMMENDERS

Professor Norman Spaulding
Stanford Law School
(650) 995-6788
nspaulding@stanford.edu

Professor Diego Zambrano
Stanford Law School
dzambran@law.stanford.edu

Professor Mark Kelman
Stanford Law School
mkelman@stanford.edu

REFERENCES

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Civil Appellate Staff, U.S. Department of Justice
Sam.Chaifetz@gmail.com

Hon. Thomas Kuhnle
San Jose Superior Court
(408) 792-4248
tkuhnle@scscourt.org

Michael Holley
Office of the Federal Public Defender, Middle District of Tennessee
(615) 457-4768
michael_holley@fd.org

Professor James A. Sonne
Director of Stanford Religious Liberty Clinic
(650) 723-1422
jsonne@law.stanford.edu

Leland Stanford Jr. University
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Law Unofficial Transcript

Name : Valente,Sergio
Student ID : 06485150

Print Date: 05/30/2023

-------- Academic Program --------

Program : Law JD
09/14/2020 : Law (JD)
Plan
Status Active in Program

-------- Beginning of Academic Record --------

2020-2021 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	201	CIVIL PROCEDURE I	5.00	5.00	MPH	
Instructor:		Zambrano, Diego Alberto				
LAW	205	CONTRACTS	5.00	5.00	MPH	
Instructor:		Fried, Barbara H				
LAW	219	LEGAL RESEARCH AND WRITING	2.00	2.00	MPH	
Instructor:		Song, Ji Seon				
LAW	223	TORTS	5.00	5.00	MPH	
Instructor:		Engstrom, Nora Freeman				
LAW	241A	DISCUSSION (1L): WHY IS THE USA EXCEPTIONAL -- IN CRIME AND PUNISHMENT?	1.00	1.00	MPH	
Instructor:		Weisberg, Robert				

LAW TERM UNTS: 18.00 LAW CUM UNTS: 18.00

2020-2021 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	203	CONSTITUTIONAL LAW	3.00	3.00	H	
Instructor:		Martinez, Jennifer				
LAW	207	CRIMINAL LAW	4.00	4.00	P	
Instructor:		Mills, David W				
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	P	
Instructor:		Alexander, Yonina				
LAW	2401	ADVANCED CIVIL PROCEDURE	3.00	3.00	H	
Instructor:		Zambrano, Diego Alberto				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 30.00

2020-2021 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	217	PROPERTY	4.00	4.00	H	
Instructor:		Kelman, Mark G				
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	H	
Instructor:		Alexander, Yonina				
LAW	2001	CRIMINAL PROCEDURE: ADJUDICATION	4.00	4.00	H	
Instructor:		Weisberg, Robert				
LAW	2402	EVIDENCE	4.00	4.00	H	
Instructor:		Sklansky, David A				

LAW TERM UNTS: 14.00 LAW CUM UNTS: 44.00

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	1029	TAXATION I	4.00	4.00	P	
Instructor:		Bankman, Joseph				
LAW	6001	LEGAL ETHICS	3.00	3.00	H	
Instructor:		Spaulding, Norman W.				
LAW	7001	ADMINISTRATIVE LAW	4.00	4.00	H	
Instructor:		O'Connell, Anne Margaret Joseph				
LAW	7106	JUDGING IN THE 21ST CENTURY	2.00	2.00	P	
Instructor:		Danner, Allison A				
LAW	7846	ELEMENTS OF POLICY ANALYSIS	1.00	1.00	MP	
Instructor:		Brest, Paul Herman, Luciana Louise MacCoun, Robert J				

LAW TERM UNTS: 14.00 LAW CUM UNTS: 58.00

2021-2022 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	807E	POLICY PRACTICUM: GLOBAL JUDICIAL REFORMS	2.00	2.00	MP	
Instructor:		Zambrano, Diego Alberto				
LAW	2403	FEDERAL COURTS	4.00	4.00	H	
Instructor:		Spaulding, Norman W.				
Transcript Note:		Gerald Gunther Prize for Outstanding Performance				
LAW	7012	CONSTITUTIONAL LAW: SPEECH AND RELIGION	4.00	4.00	H	
Instructor:		McConnell, Michael				
LAW	7512	STATISTICAL INFERENCE IN LAW	3.00	3.00	MP	
Instructor:		Donohue, John J.				

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Leland Stanford Jr. University
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Law Unofficial Transcript

Name : Valente,Sergio
Student ID : 06485150

LAW TERM UNTS: 13.00 LAW CUM UNTS: 71.00

2021-2022 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	918A	RELIGIOUS LIBERTY CLINIC: PRACTICE	4.00	4.00	H	
Instructor:		Huq, Zeba Azim Sonne, James Andrew				
LAW	918B	RELIGIOUS LIBERTY CLINIC: CLINICAL METHODS	4.00	4.00	P	
Instructor:		Huq, Zeba Azim Sonne, James Andrew				
LAW	918C	RELIGIOUS LIBERTY CLINIC: CLINICAL COURSEWORK	4.00	4.00	H	
Instructor:		Huq, Zeba Azim Sonne, James Andrew				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 83.00

2022-2023 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	H	
Instructor:		Weisberg, Robert				
LAW	4005	INTRODUCTION TO INTELLECTUAL PROPERTY	4.00	4.00	H	
Instructor:		Ouellette, Lisa Larrimore				
LAW	7095	ADVANCED ADMINISTRATIVE LAW	3.00	3.00	P	
Instructor:		O'Connell, Anne Margaret Joseph				
LAW	7820	MOOT COURT	2.00	2.00	MP	
Instructor:		Fenner, Randee J Pearson, Lisa M				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 96.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	400	DIRECTED RESEARCH	3.00	3.00	H	
Instructor:		Spaulding, Norman W.				
LAW	1013	CORPORATIONS	4.00	4.00	H	
Instructor:		Milhaupt, Curtis				
LAW	7038	REMEDIES	3.00	3.00	H	
Instructor:		Lemley, Mark Alan				
LAW	7062	ORIGINALISM	2.00	2.00	H	
Instructor:		McConnell, Michael				
LAW	7820	MOOT COURT	1.00	1.00	MP	
Instructor:		Fenner, Randee J Pearson, Lisa M				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 109.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	400	DIRECTED RESEARCH	3.00	3.00	H	
Instructor:		O'Connell, Anne Margaret Joseph				
LAW	7010B	CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT	3.00	0.00		
Instructor:		Schacter, Jane				
LAW	7041	STATUTORY INTERPRETATION	3.00	0.00		
Instructor:		Slocum, Brian				
LAW	7826	ORAL ARGUMENT WORKSHOP	2.00	0.00		
Instructor:		Fenner, Randee J				

LAW TERM UNTS: 3.00 LAW CUM UNTS: 112.00

END OF TRANSCRIPT

Mark G. Kelman
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June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Sergio Valente tells me that he has applied to serve as your law clerk following his graduation from the law school here at Stanford in June 2023. Sergio was one of the very strongest students in my Property class in his first year spring, and, without any doubt, the most enthusiastic, curious, and engaged learner in the class. He is certain to work both hard and capably to master any material that comes before you in chambers, no matter how complex, and he will be a tireless worker. I am quite sure as well that he will soak up all of the many lessons you can provide him; I've taught very few students in the forty plus years I've been teaching that I am more certain would gain all that can be gained from clerking. I recommend him quite strongly.

Generally speaking, I've felt less confident recommending the students from large classes that I taught in the spring of 2020 and those I taught in 2020-21 because I felt I had a much weaker sense of both the virtues and flaws of students I taught over Zoom. Sergio is an exception, both because he was one of the small handful of students who stayed after class almost every session to pursue issues we'd raised during class and one of the few students who regularly attended (outdoor, in-person) office hours to discuss the material. Sergio had terrific questions and comments about the incredibly wide range of material that we do in the Property class. He had sharp questions about the most formal units (e.g., the Rule against Perpetuities) to help him ensure that he mastered the mechanical rules. He had truly thoughtful observations and questions about material in which there is a range of perspectives on how to handle recurring controversies (e.g., the degree to which we should police private land use plans and, if so, whether ex ante or ex post policing devices are better or whether we should leave it up to initial contractors to determine if they want to bind successors with notice of their plans; the degree to which we can establish reasonable limits on the use of the condemnation power.) He had intelligent reactions to particular doctrines we were studying and cases we were reading (e.g., was Judge Posner persuasive to argue in *Desnick* that journalists who did not disclose that they were actually investigative reporters rather than customers, were not trespassing even though assent to enter was grounded in misrepresentation? Was Judge Kozinski right to argue in *Roommates.com* that the Fair Housing Law did not apply to the selection of roommates?) and thoughtful responses to discussions that bore on a wide range of cases (e.g., about methods of statutory or constitutional interpretation.)

I was not the least bit surprised that he did so well on the final exam. (He just missed getting a Class Prize.) Once more, he was on top of the mechanical material (e.g., some questions that raised estates in land issues and some that involved fairly uncontroversial application of adverse possession rules) and on top of more difficult problems (e.g., a problem involving the adoption of a by-law by a Neighborhood Association board, another that raised issues in copyright that the students first confronted on the exam). And I was not surprised when he approached me at the end of his year to talk through a project that ultimately did not pan out as he hoped it might that raised interesting issues about plaintiffs who seek injunctive remedies to vindicate interests distinct from the interests designed to be protected by giving them a legal right (this issue is raised in *Desnick*, and comes up as well, for instance, when competitors make use of antitrust law simply to injure competitors or in some NIMBY suits.)

Looking at the work he has done in Law School since the time I was in close touch with him only confirms my highly positive impressions. I was pleased, but not surprised, to learn that he won the Best Oral Advocate prize at our Moot Court competition, that he wrote a publishable student Note for our Law Review, co-authored an article that will be published in the NYU Law Reviews, and that he is now working on yet another substantial paper on standing in FOIA suits.

I genuinely admire Sergio's energy and intelligence, genuinely admire his capacity to be self-critical, both about his own ideas and about the work he has done. (It is *very* rare to run into a student – all too rare I'd add – who had gotten his poorest grades in two courses in the term in which he had a serious medical issue who tells me, "I doubt I'd have done better even if I hadn't been recovering." It is equally rare to run into a student who expresses genuine admiration for some of the political actions his classmates have taken but still can explain why he felt uncomfortable taking some of the precise same actions.)

As I said, I think there is every reason to believe Sergio will do exemplary work in your chambers and every reason to believe that he will benefit a great deal from clerking. Naturally, if you have questions or concerns, you should feel free to reach out to me. Suffice it to say, though, for now that I think he is a first-rate applicant.

Sincerely,

/s/ Mark G. Kelman

Mark Kelman - mkelman@stanford.edu - (650) 723-4069

James C. Gaither Professor of Law and Vice Dean

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559 Nathan Abbott Way
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June 11, 2023

The Honorable Juan Sanchez
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601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is with great enthusiasm that I write to recommend Sergio Valente for a clerkship in your chambers. Sergio is an excellent student in his class at Stanford Law School. He is lightning-sharp, professional, entrepreneurial, self-starting, and competent. That is why he has received excellent grades (14 Honors grades in 21 graded classes), including an H in my class, Advanced Civil Procedure, and a book prize in Federal Courts. While his exam in my 1L class Civil Procedure class was not graded due to COVID, he would've received another Honors grade as well. Notice that he has performed well (Honors grades) in difficult classes: Federal Courts, Advanced Civil Procedure, Criminal Procedure, Evidence, and Administrative Law. Beyond grades, however, he has been a star student: winner of the law-school-wide Kirkwood moot court (and best oralist), involved in multiple publications, and a superb research assistant for me, displaying high competence and top-notch research abilities. Indeed, I found Sergio such an impressive thinker that I asked him to co-author a law review piece with me— The Full Faith & Credit Clause and the Puzzle of Abortion Laws, 98 *New York University Law Review Online* (forthcoming 2023). Every single time, his work product was polished, on time, thorough, and carefully researched. I am convinced that Sergio would be a great law clerk who would bring hard work, proficiency, and intelligence.

I'd like to start with Sergio's ability as a self-starting and entrepreneurial research assistant. In 2021, I asked Sergio to be my research assistant for a project titled "Private Enforcement in the States." This was a particularly difficult project that involved training a machine learning algorithm to identify private enforcement clauses in state statutes. I asked Sergio to become an expert on private enforcement and to train the algorithm to identify those clauses. He was a superb research assistant on that front, devoting endless hours and becoming an expert on the topic. He was careful. He was thoughtful. He always turned in finished work. He was also conscientious. For example, at the outset of our project, he wrote a lengthy email with concerns about our methodology and the project. This was an impressive response to my research request because it raised questions and difficulties I had not considered. Even when an assignment is straightforward, Sergio showed that he could pay close attention and provide feedback on potential problems. Indeed, Sergio gave me honest feedback about flaws in my methodology that could doom the project.

And his excellent research assistance came out as a co-author on another project involving the Full Faith and Credit Clause. The project centered on a particularly complex doctrinal question about the penal judgments exception. Sergio again quickly became an expert in the topic, explaining the law carefully, spotting difficult questions, and providing well-written summaries on the case law and doctrinal complexities. He drafted a memorandum on the penal judgment exception and its interaction with a proposed California bill. His writing was crisp, straightforward, and clear. He laid out the argument for why California's AB 1666 may not violate the Full Faith and Credit clause. His work was spot-on and impressive. He was excellent at every step of the way; energetic, low-maintenance, and totally self-starting. And he did all of this in the most professional and cheerful way. Sergio is a star researcher and writer.

He displayed independent thinking and stellar research abilities in class, too. In Civil Procedure, he was one of my best students, always prepared for class, eager to contribute, and passionate about litigation. His exam was in the top ten in the class. In fact, Sergio wrote such a stupendous answer on personal jurisdiction and an *Erie* question that I circulated it to the class as a "model" answer. As I mentioned above, he did not receive a grade in this class due to COVID, but his exam would've received an Honors grade. Sergio was also a student in my Advanced Civil Procedure class. As you may know, Advanced Civil Procedure provides instruction in some of the most important and foundational concepts in our litigation system – class actions, multidistrict litigation, preclusion, etc. I, therefore, have a unique view of Sergio's aptitude for litigation and the way our judiciary operates. I can tell you without hesitation that he was one of the most brilliant, competent, and diligent law students in the class. This time he did receive an Honors grade in the class.

In all of these classes and interactions, Sergio's energy and wide-ranging knowledge about law and legal topics has dazzled me. His class participation has always been ahead of the class. In our discussions on topics like personal jurisdiction or preclusion, Sergio developed a sophisticated understanding of litigation. Again and again, Sergio made particularly compelling contributions to debates in class. He was always prepared. And he was also careful about his input. It was clear to me that he spotted and understood the importance of thinking about these topics. He also performed admirably while on call in other classes. His participation showed that he is exceptionally bright.

Sergio has always displayed to me three traits that I find compelling: he is inquisitive, devoted to his work, and has embraced an ethic of hard work. Most importantly, Sergio likes to debate across a range of topics and seems to know a little bit about

everything. I have spent hours with Sergio discussing issues like California environmental regulations, foreign policy, and machine learning. It became clear from our conversations that Sergio is a *voracious reader* who knows something about many different topics. He is interesting. And he is also interes*ted* in different legal areas. And he not only discusses these topics, but he also shows an intricate understanding of the legal system and potential arguments on both sides of every debate.

Sergio's other activities also highlight Sergio's entrepreneurialism and eagerness to write, especially his two publications and his recent win in the Kirkwood Moot Court. At the oral argument, Sergio wow-ed the judges with his impressive skills, carefully summarizing relevant case law while pushing his arguments forward. Moreover, his recent publications highlight that Sergio is a creative writer. Not only did the Stanford Law Review accept his student note, but Sergio also co-authored a successful law review piece with me.

Finally, let me say something about Sergio's professionalism. He is respectful and decent. He arrived in class on time, asked intelligent questions based on the readings, treated his classmates with respect, and always submitted polished drafts as an R.A. He also participates in the Clean Slate Pro Bono Project as a Senior leader. He has told me how he worked to expand the pro bono program to help the public defender's office beyond Santa Clara County. It's clear that Sergio has been preparing himself well for the litigation world, taking a series of substantive doctrine classes. Sergio is simply a star and a valued member of the Stanford community.

The bottom line is this: Sergio is an all-around talent; highly competent; a devoted law student; professional and intelligent; as well as a quick learner. I am confident he would be a first-rate clerk in your chambers. Without hesitation, I give him a strong recommendation.

Sincerely,

/s/ Diego A. Zambrano

Diego Zambrano - dzambrano@law.stanford.edu

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Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

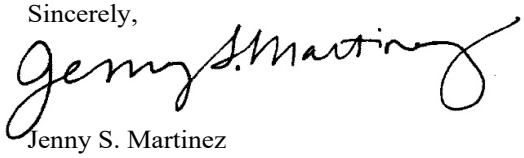
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

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June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Sergio Valente is one of the most extraordinary students I've met in recent years. He is exceedingly bright – the kind of quickness analytically you rarely see but immediately recognize. He is also humble and kind – the sort of student who thinks first about the needs of those around him, works tirelessly to extend himself to meet those needs, and despite all his wonderful intellectual gifts, takes no personal pleasure in putting them on display. I have come to know him very well in my Federal Courts and Legal Ethics class and in his contributions to a new organization at the law school dedicated to promoting civil discourse and dialogue across difference at a time of heightened polarization. More recently, I have supervised the research paper he wrote on an intricate habeas corpus issue published as a note by the Stanford Law Review – he is one of only a handful of students to write on to the law review this way. He has also served as a superb research assistant for me, working to complete edits on a new federal courts casebook I am co-authoring. In every one of these settings he has been a *standout*, often making transformative contributions.

In Federal Courts, Mr. Valente was one of the top students in the class. I teach the class in a tutorial format. There are common lectures for all 60 students, but each week the class is broken in to groups of 5 students for 70-minute tutorial sessions. Given the complexity of the material on federal jurisdiction and structural constitutional law I have found this format provides opportunities for deeper engagement with students, more rigorous Socratic questioning, and broader participation. There is also no hiding. Mr. Valente's poise, close preparation, and acuity were on rich display in the tutorial session. Most weeks he made the defining contribution, sometimes under withering Socratic questioning that many other students could not sustain. At other times he would volunteer a perspective that deepened the understanding of the group.

His exam for the class was the highest-scoring exam for the entire class. He was one of *only two* 2Ls in the class – everyone else was a 3L and a top-performing student in their graduating class. The exam was an 8-hour take-home covering everything from the Supreme Court's new standing decision in *TransUnion* to adequate and independent state ground, the standard of review under 28 U.S.C. § 2254(d), retroactivity under *Teague*, state sovereign immunity, officer immunity, and municipal liability doctrine. Mr. Valente's exam was quite simply outstanding, revealing not only careful, scrupulously thorough preparation and integration of the doctrine, but razor-sharp analytic precision and fact distillation. The writing was concise and showed no signs of the time pressure under which the exam was taken. He took a richly deserved Book Prize for the class.

His performance in a competitive 85-person Legal Ethics class in 2021 also earned Honors. In both classes I assign short essays and his became some of my very favorite to read. It's not that he has any particular flare as a writer or delights in turning a phrase. What I admire is the economy and exactitude of his writing. These are, especially in legal writing, invaluable attributes.

I hired him as a research assistant to assist in the production of the new federal courts casebook because of this exceptional performance and because I needed a student with wide intellectual range. It is hard to find his combination of analytic power, attention to detail, work ethic, writing/editing skill, and grit. Mr. Valente has these in abundance and his research work for me has been submitted on time (sometimes even early), it is reliably comprehensive, and he is able to anticipate directions the work needs to go without prompting. For all of these reasons I expect him to excel under the demands of a federal judicial clerkship.

You can see other evidence of his energy and talents in the fact that he has sustained high academic performance while serving as a Senior Editor on a law journal, contributing time in direct pro bono service and as a pro bono program leader, in the time he has dedicated to an entirely new organization working on depolarization, and in his prize-winning performance in the law school's most competitive moot court competition. Especially in the organization working on polarization (which is run by myself and one of our former deans), Mr. Valente has distinguished himself by his intellectual curiosity, his ability to solicit and attend to multiple viewpoints on hotly contested topics, and his attentiveness and generosity of spirit toward others.

Here, in sum, is a candidate with all the attributes one seeks in a clerk to work on the hardest cases, collaborate smoothly in chambers, and perform to the very highest standards. I recommend him to you most enthusiastically and without reservation of any kind.

If you have any questions or if I can be of any further assistance to you please do not hesitate to contact me.

Sincerely,

/s/ Norman W. Spaulding

Norman Spaulding - nspaulding@law.stanford.edu - (650) 736-1854

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WRITING SAMPLE

The following is a forthcoming Note being published in June 2023 in the Stanford Law Review. Law review editors made a few small substantive suggestions, primarily to the discussion of *Crain* on pages 10040-41, which I incorporated during the editing process. The law review editors are also part-way through the process of editing the piece for citation formatting and spelling/grammar to bring it in line with the Law Review's "Redbook," which differs from the Bluebook. The Note is attached in full for your convenience, however, the analysis begins on page 10020.

NOTE

An Overlooked Consequence: How *Shinn v. Ramirez* Paves the Way for New State Collateral Proceedings

Sergio Filipe Zanutta Valente*

Abstract. The Supreme Court's recent decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), diminished the role of federal courts in protecting defendants' Sixth Amendment right to effective assistance of counsel by limiting when a defendant can raise an ineffective-assistance-of-counsel (IAC) claim in federal court. Defendants in states like Arizona and Texas—which bar raising IAC claims until state habeas proceedings—will be unable to effectively litigate those Sixth Amendment claims in federal court. In other states that do not defer IAC claims, a defendant has the right on appeal (1) to raise an IAC claim regarding their trial counsel and (2) to raise that claim with the constitutional guarantee of the effective assistance of their appellate counsel. But in states like Arizona and Texas, the first right is deferred to state habeas, and the second right—because there is no constitutional right to effective assistance of counsel in state habeas proceedings—is extinguished altogether.

This Note considers what *Shinn* portends for defendants in states that defer IAC claims to state habeas proceedings. The Note argues that, while there may be no right to a remedy in federal court, the Constitution requires that state courts fill the vacuum left by the departure of the federal courts.

The argument proceeds in three steps. First, where defendants have a Sixth Amendment right to counsel, they may assert that right by raising an IAC claim. Second, that right includes presenting evidence in support of the IAC claim. Finally, when a state defers IAC claims from a proceeding in which the defendant ordinarily would have a right to effective assistance of counsel to one where the defendant ordinarily lacks such a right, for

* J.D. 2023, Stanford Law School. I owe a debt of gratitude to Paul Bleich, whose curiosity lead to the conversation that sparked the idea for this Note; to Norman Spaulding, whose guidance and support shepherded that idea into the form of a Note; to Mariah Mastrodimos, Parker Kelly, Jeffrey Fisher, Robert Weisberg, and David Sklansky, whose insight helped me untangle the web of federal habeas doctrine; and to Katelyn Deibler, Erich Remiker, and Yixuan Liu, whose meticulous editing transformed the Note into what it is today. Thank you as well to the editors of the *Stanford Law Review*, especially Connor Werth, Jamie Halper, Caroline Hunsicker, Max Kennedy, William Moss, Conrad Sproul, and Mary-Claire Spurgin.

example state habeas proceedings, the state must provide the defendant with effective assistance of counsel at that subsequent proceeding.

If all three of these propositions are true, this Note argues defendants in states that defer IAC claims have the right to an additional forum: one where they can raise an IAC claim about the lawyer that first raised an IAC claim on their behalf. Providing such a forum would restore defendants to the same constitutional position as defendants in other states. While the federal courts used to provide this forum, after *Shinn v. Ramirez*, they have bowed out. The task now falls to the state courts.

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An Overlooked Consequence: How Shinn v. Ramirez *Paves the Way for New State Collateral Proceedings*
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Introduction

The Supreme Court's recent habeas corpus decision in *Shinn v. Ramirez* included a blistering dissent and sparked a fierce outcry from habeas experts.[1] Commentators described the impact of the decision as "nightmarish"[2] and "Orwellian."[3] But these reactions overlook how the decision interacts with existing doctrine and what the decision portends for state procedures. This Note takes up those questions and concludes that, while *Shinn* closes the door to federal court, it opens the path for state remedies.

Shinn and its predecessors address a complex procedural issue.[4] Defendants in criminal cases have a constitutional right to counsel at trial and on their first appeal—sometimes called direct review.[5] When defendants have a constitutional right to counsel, they may raise an ineffective-assistance-of-counsel (IAC) claim, challenging the effectiveness of their representation.[6] And if the counsel's performance fails the requisite standard, defendants are entitled to a new trial.[7] Thus, on direct review, a defendant may challenge the efficacy of their trial counsel, and they are entitled to the effective assistance of appellate counsel while they do so.[8]

1. 142 S. Ct. 1718 (2022); s*ee id.* at 1750 (Sotomayor, J., dissenting) (decrying the majority's decision as making "illusory the protections of the Sixth Amendment"); Christina Swarns, *Innocence Project Statement from Executive Director Christina Swarns on Shinn v. Ramirez and Jones*, INNOCENCE PROJECT (May 24, 2022), https://perma.cc/YKA3-CJBT; Cary Sandman, *Supreme Court Turns a Blind Eye to Wrongful Convictions, Guts 6th Amendment Rights to Effective Counsel*, N.Y. ST. BAR ASS'N J., Sept.-Oct. 2022, at 17, 18.
2. Swarns, *supra* note 1.
3. Michael A. Cohen, Opinion, *The Supreme Court Just Said that Evidence of Innocence Is Not Enough*, DAILY BEAST (updated May 24, 2022, 4:10 AM ET), https://perma.cc/6JBQ-TAZ2.
4. *See* Martinez v. Ryan, 566 U.S. 1, 17 (2012) (holding that where state law prevents a defendant from raising an ineffective assistance of counsel (IAC) claim on direct review, federal courts will excuse procedural default for such claims if the defendant lacked effective counsel in state habeas proceedings); Trevino v. Thaler, 569 U.S. 413, 417 (2013) (extending the holding in *Martinez* to cases where it is technically possible, but "virtually impossible," to raise IAC claims on direct review).
5. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Douglas v. California, 372 U.S. 353, 357-58 (1963); Evitts v. Lucey, 469 U.S. 387, 409 (1985) (referring to the first appeal from a conviction as "direct review").
6. *See* Strickland v. Washington, 466 U.S. 668, 686-87 (1984).
7. *See id.* at 687 (clarifying that a defendant is entitled to reversal of their conviction because of IAC only if they establish first that their counsel "was not functioning as 'counsel'" and second "that the deficient performance prejudiced the defense").
8. *See id.*; *Evitts*, 469 U.S. at 396 ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.").

But Arizona and six other states require defendants to postpone filing IAC claims about their initial trial counsel until the beginning of state habeas proceedings (also referred to as "collateral review").[9] In other words, these states bar defendants from raising IAC claims until after their direct appeal.[10] However, there is no constitutional right to counsel under *Gideon v. Wainwright* and its progeny after direct review.[11] Defendants challenging IAC by trial counsel in states like Arizona thus proceed without a constitutional guarantee of the assistance of counsel.[12] This means that even if a defendant's trial counsel were unconstitutionally ineffective, the defendant has no right to a free attorney to help them prove it. Moreover, even if they have the means to secure habeas counsel, there is no constitutional guarantee that the habeas lawyer they hire to challenge the performance of their trial counsel must be effective.[13] If the lawyer raises the defendant's trial-based IAC claim ineffectively, the defendant has no remedy.[14] This procedural rule in states like Arizona is particularly consequential because researchers estimate that defendants raise IAC claims in nearly half of postconviction proceedings.[15]

9. *See* State v. Spreitz, 39 P.3d 525, 526-27 (Ariz. 2002) (describing Arizona's procedural rule). The Supreme Court has identified procedural rules effectively deferring IAC claims until state habeas proceedings in three states. *See Martinez*, 566 U.S. at 6 (Arizona); *Trevino*, 569 U.S. at 417 (Texas); Coleman v. Thompson, 501 U.S. 722, 755 (1991) (Virginia). And the federal courts of appeal have found many states' procedural rules fit within either *Martinez*'s or *Trevino*'s holdings. *See* Brown v. Brown, 847 F.3d 502, 506 (7th Cir. 2017) (Indiana); Coleman v. Goodman, 833 F.3d 537, 541 (5th Cir. 2016) (Louisiana); Fowler v. Joyner, 753 F.3d 446, 463 (4th Cir. 2014) (North Carolina, in some cases); Sutton v. Carpenter, 745 F.3d 787, 790 (6th Cir. 2014) (Tennessee); Sasser v. Hobbs, 735 F.3d 833, 852-53 (8th Cir. 2013) (Arkansas). The majority of states, although they do not completely bar IAC claims on appeal, limit such claims to only those which are apparent from the record—a minority of IAC claims. *See* Commonwealth v. Grant, 813 A.2d 726, 735 n.13 (Pa. 2002) (collecting cases from other states requiring any IAC claims to be litigated in habeas review unless the claim is apparent on the trial record); Shinn v. Ramirez, 142 S. Ct. 1718, 1746 (2022) (Sotomayor, J., dissenting). This Note does not focus on states that bar defendants from raising IAC claims on appeal in only some cases but rather on the seven states—Arizona, Arkansas, Indiana, Louisiana, Tennessee, Texas, and Virginia—that federal courts have concluded categorically or effectively bar defendants from raising IAC claims on appeal in all cases.

10. *See Martinez*, 566 U.S. at 6.

11. 372 U.S. 335 (1963); *see Shinn*, 142 S. Ct. at 1735.

12. *See id.*

13. *See id.*

14. *See id.*

15. *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, NAT'L CTR. FOR STATE CTS., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 56 (2007) (finding that 50% of non-transferred cases with available information—which comprised 64% of the cases surveyed—involved IAC claims).

The lack of a constitutional right to counsel when raising a trial-based IAC claim can also affect a defendant's ability to raise other claims in subsequent proceedings. If the IAC claim is not raised in state habeas, it typically leads to procedural default, precluding review of the claim in a federal petition under 28 U.S.C. § 2254 after state habeas proceedings conclude.[16] Prior Supreme Court precedent held that in such a situation the ineffectiveness of state habeas counsel, in failing to raise the ineffectiveness of trial counsel, could excuse procedural default.[17] *Shinn* altered this arrangement, functionally extinguishing defendants' ability to raise such claims in federal court, albeit without modifying the law of procedural default.[18] In *Shinn*, the Court held that, even if the ineffectiveness of state habeas counsel is a valid excuse for failing to raise an IAC claim, 28 U.S.C. § 2254(e) bars federal district courts from holding evidentiary hearings and receiving new evidence in support of the IAC claim.[19] Without any ability to provide new evidence in support of their IAC claims, there is little chance defendants can successfully litigate the issue.[20]

Effectively litigating IAC claims is vitally important to defendants' chances of relief. Roughly 50% of postconviction cases involve IAC claims,[21] and 53% of terminated capital cases and 13% of terminated noncapital cases

16. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1218-19 (1996) (codified at 28 U.S.C. § 2254); *see Shinn*, 142 S. Ct. at 1733.

17. *See* Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977); Martinez v. Ryan, 566 U.S. 1, 17 (2012); Trevino v. Thaler, 569 U.S. 413, 422-23 (2013).

18. *See Shinn*, 142 S. Ct. at 1740 (Sotomayor, J., dissenting) ("In reaching its decision, the Court all but overrules two recent precedents that recognized a critical exception to the general rule that federal courts may not consider claims on habeas review that were not raised in state court.").

19. *See id.* at 1734 (majority opinion).

20. *See id.* at 1738-39. A narrow class of defendants may have suffered forms of trial IAC which the trial record will reflect and thus will not need an evidentiary hearing to prove IAC. *See* Michael C. Dorf, *Failure to Extend a Precedent Versus Failure to Apply It: A Comment on Shinn v. Martinez Ramirez*, DORF ON L. (May 25, 2022), https://perma.cc/YT2X-RSEB ("There are some settings in which trial or sentencing counsel's ineffectiveness will be apparent even on the state court record, so that a federal habeas petitioner who was denied effective counsel can prevail even without an evidentiary hearing."). For example, if the defendant's lawyer was noticeably drunk at trial and slurred their words—as reflected on the transcript—the lawyer's ineffectiveness would likely be apparent. This class of claims is not the subject of this Note because *Shinn* does not stand in their way. Here, I focus on the more typical case in which, without an evidentiary hearing, there is no way to establish IAC.

21. *See* KING ET AL., *supra* note 15, at 56 (finding that 50% of non-transferred cases with available information, which comprised 64% of the cases surveyed, involved IAC claims); *see also* Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1118 & n.87 (1999) ("Challenges based on ineffective assistance of counsel are the most frequently filed claims in both federal and state post-conviction relief proceedings.").

involve claims rejected because of procedural default—a result a successful IAC claim could prevent.[22] While defendants would normally be able to raise IAC claims regarding their initial trial counsel with the effective assistance of counsel, state procedural rules deferring the claims to habeas review mean that defendants in at least seven states cannot.[23] Procedural default impedes them from vindicating their constitutional right to counsel—as well as many other rights—because, ironically, they have no right to effective assistance of counsel to help them raise the claim. Although this Note focuses on the seven states that completely bar litigating IAC claims on appeal—Arizona, Arkansas, Indiana, Louisiana, Tennessee, Texas, and Virginia—the logic could extend to the vast majority of states, which bar IAC claims during direct review in most cases.[24]

Commentators have generally addressed the same issue the *Shinn* dissent emphasized: The decision severely diminishes access to relief for IAC in *federal* court.[25] This is certainly important, but in their rush to condemn the Court's opinion on this ground, commentators overlooked the opinion's implications for state collateral review. I argue that in states like Arizona, which defer IAC claims to state habeas proceedings, the Constitution affords defendants the right to a single forum to raise their trial IAC claim with the assistance of effective counsel. Essentially, the Constitution protects their rights just as it does in states which do not defer IAC claims to state habeas. In states that do not defer IAC claims, a defendant has the right on direct review (1) to raise an IAC claim regarding their trial counsel and (2) to raise that claim with the constitutional guarantee of the effective assistance of their appellate counsel. But in Arizona and states like it, the first right is deferred to state habeas while the second right is extinguished because there is no constitutional right to effective assistance of counsel in state habeas proceedings. Therefore, where state habeas is the first opportunity to raise a trial-based IAC claim, and state habeas counsel fails to raise (or fails to adequately raise) a meritorious trial-based IAC claim, there must be a subsequent forum for the defendant to challenge that failure.[26] Because *Shinn* effectively closes the door to federal

22. *See* KING ET AL., *supra* note 15, at 48.

23. *See supra* note 9 (listing states with similar procedures to Arizona).

24. *Id.*

25. *See, e.g.*, Swarns, *supra* note 1 ("This decision will leave thousands of people in the nightmarish position of having no court to hear their very real claims of innocence."); Cohen, *supra* note 3 (characterizing *Shinn* as creating "a truly bizarre, even Orwellian situation"); Sandman, *supra* note 1, at 18 (criticizing *Shinn* as taking "a wrecking ball to *Martinez*, and by turns, *Gideon* and *Strickland*" and emphasizing the dissent's criticism of the decision).

26. That subsequent forum, however, need not include a right to counsel of its own.

courts for such claims, the constitutional obligation falls on states to create adequate procedures to protect the right to counsel.

The remainder of this Note proceeds as follows. Part I covers the background of Sixth Amendment doctrine and postconviction relief leading up to *Shinn*. Part II, proceeding in three distinct steps, explains why the lack of access to a forum to litigate trial IAC claims with the assistance of counsel violates the Constitution. First, Part II.A reasons that the Sixth Amendment and procedural due process under the Fourteenth Amendment afford criminal defendants the right to challenge the efficacy of their counsel in at least one forum. Second, Part II.B explains that the constitutional remedy must include the opportunity to present evidence in support of the claim. Third, Part II.C argues that while a state may reasonably defer a defendant's right to challenge the efficacy of their counsel to the state's postconviction review process, it cannot do so without affording them effective counsel in that proceeding. The right to counsel encompasses the right to have that counsel raise legal defenses—including IAC.[27] If all three steps are correct, Arizona's procedural rule—and similar procedural rules in other states—are currently unconstitutional and require additional state procedures to remedy the violation. Finally, Part III considers the implications of the "unconstitutional situation" created by the combinations of the Supreme Court's statutory interpretation of 28 U.S.C. § 2254(e) in *Shinn* and Arizona's procedural rule.

The existing literature is replete with arguments in favor of a postconviction constitutional right to counsel.[28] At least one scholar argues that access to postconviction counsel is a moral imperative.[29] Others contend the Constitution enshrines the right in a variety of provisions, including the Due Process Clause, Equal Protection Clause, Suspension Clause, and Eighth Amendment.[30] These arguments, however, often directly contravene existing

27. *See infra* Part II.C; Evitts v. Lucey, 469 U.S. 387, 394 (1985).

28. *See* DONALD E. WILKES, JR., FEDERAL POSTCONVICTION REMEDIES & RELIEF HANDBOOK WITH FORMS § 2.8 (West 2022) (collecting articles arguing in favor of a postconviction right to counsel).

29. *See* Ken Strutin, *Litigating from the Prison of the Mind: A Cognitive Right to Post-Conviction Counsel*, 14 CARDOZO PUB. L., POL'Y & ETHICS J. 343, 402-03 (2016) (contending the conditions of confinement and barriers to prisoners' effective litigation necessitate a right to postconviction counsel).

30. *See* Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 596 (2009) (tracing a constitutional right to postconviction counsel to both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment); Eric M. Freeman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1092-95 (2006) (analyzing the right to postconviction counsel in death penalty cases under the *Mathews v. Eldridge* due process test and concluding it requires a constitutional right to counsel in postconviction proceedings); Donald A. Dripps, *Ineffective Litigation of Ineffective*

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Supreme Court precedent, and there is no indication the Court is interested in changing course to recognize a broad postconviction right to counsel. The Court stated in *Pennsylvania v. Finley*: "We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today."[31] The lower courts have uniformly interpreted *Finley* to reject a blanket constitutional right to postconviction counsel.[32] Thus, whatever the merits of a constitutional right to postconviction counsel in all cases, it is simply unsupported by current law.

Other scholars put forth a narrower argument—closer to the one advanced here—that a constitutional right to counsel in postconviction proceedings exists when it is the first forum in which a defendant could raise the claim. Thomas Place grounds his reasoning for such a right in a line of equal protection and due process cases providing a constitutional right to counsel on

Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States, 42 BRANDEIS L.J. 793, 799-800 (2004) (similar); Amy Breglio, Note, *Let Him Be Heard: The Right to Effective Assistance of Counsel on Post-Conviction Appeal in Capital Cases*, 18 GEO. J. ON POVERTY L. & POL'Y 247, 248-49 (2011) (deriving a broad right to postconviction counsel from Fourteenth Amendment procedural due process); 1 RANDY HERTZ & JAMES S. LIEBERMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 7.2(d) (LexisNexis 2021) (concluding the Suspension Clause protects the right to counsel in postconviction proceedings); Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1271-74 (2012) (suggesting the "access-to-courts" constitutional doctrine demands a postconviction right to counsel); Clive A. Stafford Smith & Rémy Voisin Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55, 106 (1999) (arguing the Eight Amendment requires a postconviction right to counsel in death penalty cases); Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 97-98 (determining that once the government provides a statutory right to "postconviction counsel, it is constitutionally obligated to provide *effective* counsel").

31. 481 U.S. 551, 555 (1987). *But see* 1 HERTZ & LIEBERMAN, *supra* note 30, § 7.2(a) (parsing the Supreme Court's language in *Finley* and subsequent cases and concluding it does not resolve the issue of whether a constitutional right to postconviction counsel exists); *cf.* Honore v. Wash. St. Bd. of Prison Terms & Paroles, 466 P.2d 485, 493 (Wash. 1970) (holding, before the decision in *Finley* came down, that indigent defendants have a federal constitutional right under the Equal Protection Clause to counsel in postconviction proceedings).

32. *See* United States *ex rel.* Simmons v. Gramley, 915 F.2d 1128, 1137 (7th Cir. 1990) (interpreting *Finley* to reject a constitutional right to postconviction counsel); Kitt v. Clarke, 931 F.2d 1246, 1248 n.4 (8th Cir. 1991) (rejecting, in dicta, a constitutional right to effective assistance of counsel in postconviction proceedings); DeLuna v. Lynaugh, 873 F.2d 757, 760 (5th Cir. 1989) ("[T]here is no constitutional right to appointed counsel in collateral proceedings such as a habeas corpus petition.").

appeal.[33] These cases emphasize that, on direct review, defendants lack the benefit of an attorney-prepared brief from a prior proceeding.[34] Place contends that this logic applies with equal force to postconviction proceedings when they are the first forum in which a defendant can raise the claim.[35] This Note's argument aligns in some respects with Place's, but it concentrates on claims regarding the effectiveness of initial trial counsel—not the first time any IAC claim is raised. It also differs from Place's argument in a more fundamental way: It derives a constitutional mandate for assistance of counsel from the Sixth Amendment and the Fourteenth Amendment's Due Process Clause—not the Equal Protection Clause. Place's argument under the Equal Protection Clause is not only based on a different right, it offers no limiting principle.[36] Having a limiting principle is important because, without one, the argument both conflicts with existing Supreme Court precedent and would lead to unending IAC litigation.[37]

This Note thus makes an original contribution to the literature in three ways. First, it explores how the Sixth and Fourteenth Amendments guarantee a right to counsel for IAC claims in state habeas proceedings when those proceedings are the first forum where a defendant may raise the claim.[38] Second, it argues this right—unlike other theories for a right to postconviction counsel—is consistent with existing Supreme Court doctrine, including *Shinn v. Ramirez*.[39] Finally, it analyzes how *Shinn*'s narrowing of federal remedies leads to a constitutional requirement for states to adopt remedial procedures if they wish to continue deferring IAC claims to state habeas review.[40]

I. Doctrinal Background on the Right to Effective Assistance of Counsel

This Part walks through the complex doctrine involved in *Shinn v. Ramirez*. It begins with a general overview of the right to counsel.[41] Then, in

33. *See* Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel*, 98 KY. L.J. 301, 325 (2009).

34. *See id.*; Douglas v. California, 372 U.S. 353, 357 (1963); Ross v. Moffitt, 417 U.S. 600, 614-15 (1974); Halbert v. Michigan, 545 U.S. 605, 617-19 (2005).

35. *See* Place, *supra* note 33, at 325.

36. *See id.* at 305.

37. *See infra* Part II.C.

38. *See infra* Part II.

39. *See infra* Part II.C.

40. *See infra* Part III.

41. *See infra* Part I.A.

Part I.B, it delves into postconviction review and the doctrine of procedural default.[42] Finally, Part I.C summarizes the subset of right-to-counsel doctrine pertaining to states that defer IAC claims to postconviction review and explains the Court's decision in *Shinn*.[43]

A. Effective Assistance of Counsel

The Sixth Amendment enshrines criminal defendants' right "to have the Assistance of Counsel."[44] In early cases, the right simply meant the government could not prevent a defendant from retaining counsel.[45] In the early twentieth century, the Court held that certain circumstances require trial courts to appoint counsel,[46] though the Court quickly clarified that this was not true for all criminal cases.[47] The Court then shifted course in the landmark decision *Gideon v. Wainwright*, holding that the Sixth Amendment encompasses a right to appointed counsel for all indigent criminal defendants in felony cases.[48] This new protection emerged from a recognition that the complexities of the modern criminal justice system required counsel to ensure a fair trial.[49]

With the right to appointed counsel established, the Court faced the question of how effective that counsel must be. The Court answered that question in *Strickland v. Washington*, holding that a state violates the Sixth Amendment when defense counsel's objectively deficient performance

42. *See infra* Part I.B.

43. *See infra* Part I.C.

44. U.S. CONST. amend. VI.

45. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 147-48 (2006) (describing the Assistance of Counsel Clause's "root meaning" as the right to select one's counsel and contrasting this with the more recent understanding of a right to appointment of counsel).

46. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding the trial courts' failure to appoint counsel to defendants violated the Constitution under the unique circumstances of the case). For a discussion of the tragic facts and history of this case, see N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1333-39 (2004).

47. *See* Betts v. Brady, 316 U.S. 455, 463-64, 473 (1942) (holding that the Constitution did not require courts to appoint counsel in all cases where defendants could not afford representation and limiting *Powell v. Alabama* to specific circumstances), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

48. 372 U.S. at 339, 345. The Court had already held in 1938 that federal criminal defendants had a right to appointed counsel. *See* Johnson v. Zerbst, 304 U.S. 458, 467-69 (1938). The Court later expanded the right to all cases with the possibility of imprisonment. *See* Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972).

49. *See Gideon*, 372 U.S. at 344.

prejudices the defense.[50] "Prejudice" requires demonstrating a reasonable probability that constitutionally effective counsel would have achieved a different result.[51] The Court declined to "exhaustively define the obligations of counsel,"[52] but subsequent case law offers examples of objectively deficient conduct.[53]

Although *Gideon* and *Strickland* dealt with trial counsel, the Supreme Court soon extended the right to counsel to include appellate counsel on direct review. In *Douglas v. California*, the Court declared California's failure to appoint appellate counsel to an indigent defendant unconstitutional.[54] The Court grounded its analysis in the Equal Protection Clause of the Fourteenth Amendment, holding that the denial of appellate counsel to indigent defendants discriminated between rich and poor defendants.[55] When the Court extended *Strickland*'s effective assistance of counsel standard to appellate direct review in *Evitts v. Lucey*, it recast the right as falling under the Sixth Amendment, as opposed to the Equal Protection Clause.[56] But this was the end of the line. In *Pennsylvania v. Finley*, the Court declined to extend the right to collateral proceedings,[57] and in *Ross v. Moffitt*, the Court explained the right does not reach discretionary review proceedings.[58]

In sum, criminal defendants have a right to the assistance of counsel at trial and on direct review, and the performance of counsel must be at least minimally effective at both stages.

50. *See* 466 U.S. 668, 687 (1984); *see also* Martinez v. Ryan, 566 U.S. 1, 25-26 (2012) (Scalia, J., dissenting) (describing how defense counsel's breaches of the constitutional right to effective assistance of counsel are imputed to the state itself).

51. *Strickland*, 466 U.S. at 694.

52. *See id.* at 688.

53. *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 389 (2005) (holding counsel's failure to review the defendant's prior convictions when they knew the prosecution intended to use testimony from them was constitutionally ineffective assistance of counsel); United States v. Mohammed, 863 F.3d 885, 890-92 (D.C. Cir. 2017) (reversing the lower court and holding that counsel's complete failure to investigate potential impeachment evidence was constitutionally ineffective assistance of counsel).

54. 372 U.S. 353, 357-58 (1963).

55. *See id.*

56. *See* 469 U.S. 387, 392, 396-97, 403 (1985).

57. *See* 481 U.S. 551, 555 (1987).

58. *See* 417 U.S. 600, 604-05 (1974). *But cf.* Halbert v. Michigan, 545 U.S. 605, 617-18 (2005) (distinguishing *Moffitt* in cases where the discretionary review is framed as error correction as opposed to considerations of "significant public interest").

B. Collateral Review Overview

Although the constitutional right to counsel extends only to trial and direct review, IAC is often litigated in collateral proceedings like habeas review, which attack a prior proceeding outside the traditional appellate process.[59] In some states, defendants may litigate IAC claims only in collateral proceedings.[60] This was the case in *Shinn*.[61] Thus, understanding *Shinn* and its implications requires delving into the complex world of collateral review.

During Reconstruction, Congress passed the Habeas Corpus Act of 1867.[62] Enacted in anticipation of Southern resistance to Reconstruction legislation,[63] the Act provided for federal collateral review of constitutional or other federal law claims in state convictions.[64] This meant a defendant convicted of a state crime in state court could seek federal court review of the conviction for constitutional or federal statutory defects.[65]

Perhaps the most complicated aspect of federal habeas review, and the most relevant portion for this Note, is the procedural-default requirement, which determines how a federal court reviews a petition that raises a claim the defendant did not raise in prior state proceedings.[66] For a time, the Supreme Court took a permissive approach to procedural default, giving lower federal courts latitude to consider such claims.[67] But the Burger Court imposed a stricter standard: In *Wainwright v. Sykes*, the Court held that federal courts cannot review a claim that was not presented to the state courts unless the defendant could show cause and prejudice to excuse their "default," or their

59. *See* KING ET AL., *supra* note 15, at 28; Z. Payvand Ahdout, Essay, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 187 (2021). For a helpful visual depicting the many stages of state and federal collateral review and how they add on to the initial criminal proceedings, see *id.* at 167.

60. *See infra* Part I.C.

61. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1728-30, 1735-36 (2022).

62. Ch. 28, § 1, 14 Stat. 385 (1867) (codified as amended at 28 U.S.C §§ 2241-43, 2251).

63. *See* Fay v. Noia, 372 U.S. 391, 415-16 (1963), *overruled on other grounds by* Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977). *But see* Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 49-50 (1965) (contending the Habeas Corpus Act of 1867 was not aimed at preventing resistance to Reconstruction because its provisions were poorly tailored to that goal).

64. § 1, 14 Stat. at 385-86.

65. *See id.*

66. *See* Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1166 (2005) (describing the procedural-default requirement for federal habeas proceedings); *see also* Wainwright v. Sykes, 433 U.S. 72, 82-83 (1977) (discussing the application of procedural-default requirements and potential for exceptions to the rule).

67. *See Fay*, 372 U.S. at 398-99.

failure to raise the claim first in state proceedings.[68] Procedural default is particularly important because it is one of the principal ways courts dismiss federal habeas claims without reaching the merits.[69]

Generally, IAC is grounds for a finding of cause under the *Sykes* standard.[70] If a defendant demonstrates that their counsel, to whom they were constitutionally entitled, was ineffective, they may be excused for failing to raise constitutional claims in their state proceedings.[71] Once a defendant proves this much, the gates open to litigate their constitutional claim in federal court.

In 1996, Congress returned to the scene, passing the Antiterrorism and Effective Death Penalty Act (AEDPA).[72] The law restricts access to federal habeas by, among other things, requiring defendants to exhaust all available state court remedies before filing in federal court.[73] The law also defines when a federal habeas court may hold an evidentiary hearing.[74] A federal court may do so only when (1) the defendant's constitutional claim relies on a new, retroactive constitutional rule or the factual predicate could not have been discovered earlier and (2) the facts would establish clear and convincing evidence that "no reasonable factfinder would have found the [defendant] guilty."[75] As would become apparent in *Shinn*, this new evidentiary hearing standard is critical to the success of IAC claims.[76]

Putting everything together, a defendant has the right to effective assistance of counsel at trial and on direct review.[77] If their counsel was ineffective, defendants typically raise a Sixth Amendment claim on collateral review; in some states, such as Arizona, they can raise IAC claims *only* during

68. *See* 433 U.S. at 84, 87; *see also* Coleman v. Thompson, 501 U.S. 722, 750 (1991) (reaffirming in no uncertain terms that procedural default may be excused only with a showing of cause and prejudice or a showing "that failure to consider the claims will result in a fundamental miscarriage of justice").

69. *See* Martinez v. Ryan, 566 U.S. 1, 22 (2012) (Scalia, J., dissenting); KING ET AL., *supra* note 15, at 45-48.

70. *See* Murray v. Carrier, 477 U.S. 478, 488 (1986) ("[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State . . . .").

71. *See id.*

72. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

73. *See* 28 U.S.C § 2254(b)(1)(A).

74. *See id.* § 2254(e)(2).

75. *Id.*

76. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1728 (2022).

77. *See supra* Part I.A.

collateral review.[78] To raise an IAC claim on federal habeas review when it was not presented to the state courts, the defendant must show cause for why they failed to raise it previously—either on appeal or, in states like Arizona, in state habeas proceedings.[79] IAC claims are themselves a common form of cause under the *Sykes* standard.[80] Thus, a defendant whose trial counsel was ineffective is often in a position where they must also raise an IAC claim regarding their habeas counsel's failure to raise—or doing so poorly—an IAC claim regarding their trial counsel.

If these procedural barriers seem daunting, they are intended to be. Through AEDPA and cases interpreting it, Congress and the Supreme Court have balanced the importance of federal review for constitutional error in state criminal processes against two competing concerns: federalism and finality.[81] With respect to federalism, when federal courts overturn a state court's judgment, they interfere with the state's independent enforcement of its criminal laws and protection of the interests of its people.[82] Of course, federal courts only displace state courts' judgments when they believe the state courts have violated federal law,[83] and the Supreme Court's direct appellate review of state supreme courts also interferes with states enforcing their laws.[84] However, habeas erects a separate system of federal court supervision operating alongside state criminal proceedings.[85] As a result, federal intrusions on state sovereignty come more frequently from federal courts reopening state court judgments than from the Supreme Court's appellate review.[86] Congress

78. *See infra* Part I.C.; State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002).

79. *See* Young, *supra* note 66, at 1166.

80. *See* Voigts, *supra* note 21, at 1117.

81. *See* Murray v. Carrier, 477 U.S. 478, 487 (1986) (citing Engle v. Isaac, 456 U.S. 107, 128 (1982)) (acknowledging the "costs" of federal habeas review as a lack of finality and infringing on state sovereignty); KING ET AL., *supra* note 15, at 8 ("For a majority of the members of Congress in the early 1990s, the Court's decisions did not adequately address growing concerns about federal court interference with the finality of state criminal judgments and about delay in the processing of habeas cases."). For a discussion of why the Supreme Court has looked to federal habeas review as a means of redressing constitutional violations in state courts, see Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1035-47 (1977).

82. *See* Martinez v. Ryan, 566 U.S. 1, 26, 28 (2012) (Scalia, J., dissenting) (describing how federal habeas review can "undermine the State's interest in enforcing its laws" (quoting Lee v. Kemna, 534 U.S. 362, 388 (2002) (Kennedy, J., dissenting))).

83. *See* 28 U.S.C. § 2254.

84. *See* U.S. CONST. art. III, § 2; *id.* art. VI, cl. 2.

85. *See* 28 U.S.C. § 2254.

86. *Compare* CAROL G. KAPLAN, BUREAU JUST. STAT., HABEAS CORPUS: FEDERAL REVIEW OF STATE PRISONER PETITIONS, 2-4 (Jeffrey L. Sedgwick ed., 1984) (reviewing the frequency

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and the Court have set high standards for intrusions by federal courts via habeas review.

As for finality, federal habeas cases significantly prolong criminal proceedings. As Judge Henry Friendly once wrote:

> After trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, in proceedings where the defendant had the assistance of counsel at every step, the criminal process, in Winston Churchill's phrase, has not reached the end, or even the beginning of the end, but only the end of the beginning.[87]

On average, non-capital federal habeas cases take 9.5 months to resolve, while capital cases take 28.7 months.[88] This delay is no idle inconvenience. One analysis forecasted that federal habeas review for 714 death row prisoners in California would cost $775 million.[89] And perhaps more importantly, the time federal habeas adds to criminal proceedings affects the outcome of cases and the assessment of guilt. When a federal court reverses a conviction because of IAC or other procedural errors, it typically vacates the conviction, leaving the state to decide whether to re-prosecute the case.[90] But presenting a strong case years after the fact is often difficult. Witnesses' memories fade, they move out of state, and sometimes they even die.[91] Thus, even if a jury would have convicted

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of federal habeas petitions), *with* Adam Feldman, *Empirical SCOTUS: The Importance of State Court Cases Before the Supreme Court*, SCOTUSBLOG (Sept. 4, 2020, 10:11 AM), https://perma.cc/KPU2-2K4L (observing the Supreme Court often reviews more cases from state supreme courts than cases from any individual circuit, and that most of those cases are criminal, but noting this amounts to only around a dozen state cases reviewed by the Court per year).

87. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (criticizing the focus of federal habeas proceedings on procedural, rather than substantive, issues).

88. *See* KING ET AL., *supra* note 15, at 39-41 (measuring the average duration of terminated, non-transferred cases). This adds onto what will have by this point already been a lengthy criminal proceeding. In capital cases, the time between conviction and execution takes around two decades. *See* TRACY L. SNELL, BUREAU JUST. STAT., NCJ 302729, CAPITAL PUNISHMENT, 2020—STATISTICAL TABLES, at 17 (2021).

89. Arthur L. Alacrón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S93 (2011).

90. *See, e.g.*, United States v. Mohammed, No. 06-357, 2021 WL 5865455, at *12 (D.D.C. Dec. 9, 2021) (vacating Mohammed's conviction due to an IAC claim after the D.C. Circuit's decision in *United States v. Mohammed*, 863 F.3d 885 (D.C. Cir. 2017)).

91. *See* BARRY LATZER & JAMES N.G. CAUTHEN, JUSTICE DELAYED? TIME CONSUMPTION IN CAPITAL APPEALS: A MULTISTATE STUDY 17 n.27 (2012) (noting prosecutors may decline to re-prosecute a case because it is difficult to find witnesses years after the initial trial); Friendly, *supra* note 87, at 146-47 (observing that substantial delay between initial conviction and reversal in federal habeas proceedings, particularly in cases with guilty pleas, can make re-prosecution very difficult); *see also* Martinez v. Ryan, 566 U.S. 1, 26

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the defendant absent the procedural violation, that does not mean a jury would convict them at a new trial years later.[92]

C. A Right Deferred

Into this labyrinth of constitutional doctrine and statutory interpretation, Arizona inserted a new wrinkle. In 2002, the Arizona Supreme Court held that criminal defendants must wait to raise IAC claims about their trial counsel until state habeas proceedings, barring them from raising the claims on direct review.[93] The court reasoned that IAC claims almost always require new evidence, and postconviction trial courts are better situated to hold evidentiary hearings and conduct intensive factfinding than appellate courts are.[94] However, as explained above, while defendants have a constitutional right to effective assistance of counsel on direct review under *Evitts*, they hold no such right during collateral review.[95] Therefore, defendants in Arizona could no longer challenge the efficacy of their initial trial counsel with the assistance of constitutionally guaranteed counsel. Even if they retained a lawyer in the state

(2012) (Scalia, J., dissenting) ("When a case arrives at federal habeas, the state conviction and sentence at issue (never mind the underlying crime) are already a dim memory, on average more than six years old (seven years for capital cases).").

92. Judge Friendly argues that delay can also undermine the deterrent function of the criminal justice system by decreasing the chance the defendant will accept their punishment as just because whether it is just has yet to be finally determined. *See* Friendly, *supra* note 87, at 146.

93. *See* State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002) ("[W]e reiterate that ineffective assistance of counsel claims are to be brought in [collateral] proceedings. Any such claims improvidently raised in a direct appeal, henceforth, will not be addressed by appellate courts regardless of merit. There will be no preclusive effect under Rule 32 by the mere raising of such issues. The appellate court simply will not address them."); *see also Martinez v. Ryan*, 566 U.S. 1, 6 (2012) (describing Arizona's procedural rule).

94. *See Spreitz*, 525 P.3d. at 526 ("The trial court is the most appropriate forum for such evidentiary hearings."); *see also* Shinn v. Ramirez, 142 S. Ct. 1718, 1746 (2022) (Sotomayor, J., dissenting) (observing there is "nothing nefarious" about a state's choice to move IAC claims from direct review to state collateral proceedings); Trevino v. Thaler, 569 U.S. 413, 422 (2013) (explaining some states choose to defer IAC claims to collateral proceedings because defendants receive a new attorney in collateral review, and collateral review gives the attorney more time to investigate). *But see* Place, *supra* note 33, at 316-17 (arguing that the combination of deferring IAC claims to habeas review and the custody requirement for habeas proceedings leaves defendants with shorter sentences without a remedy for IAC).

95. *See supra* Part I.B; Evitts v. Lucey, 469 U.S. 387, 402 (1985); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).

postconviction proceeding, that lawyer is not bound by the Sixth Amendment guarantee of effective assistance.[96]

The Supreme Court addressed this problem in *Martinez v. Ryan*. Luis Martinez's state habeas counsel neglected to raise an IAC claim regarding his initial trial counsel.[97] Martinez then filed a second petition for habeas relief in state court, arguing his initial "trial counsel had been ineffective for failing to challenge the prosecution's evidence."[98] After the state court denied relief because he had failed to raise the trial-based IAC claim during the first habeas proceeding, Martinez filed for review in federal court and argued his state habeas counsel was ineffective because they failed to raise an IAC claim regarding trial counsel.[99] On appeal, the Supreme Court held that, in the unusual procedural posture created by Arizona's rule, a defendant may raise an IAC claim for the first time on federal habeas review, and that such claims should not be dismissed on grounds of procedural default.[100] The following year, the Court extended *Martinez* to cases where it was technically possible to raise an IAC claim on direct review, but the state had made it de facto impossible to do so.[101] More recently, the Court clarified that *Martinez* applies only to claims regarding ineffective assistance of *trial* counsel—not *appellate* counsel.[102]

As the Court emphasized in *Shinn*, *Martinez* was not a constitutional holding.[103] Instead, the Court used its "'equitable judgment' and 'discretion'" to

96. *See* Martinez v. Ryan, 566 U.S. 1, 18-19 (2012) (Scalia, J., dissenting) (explaining that the right to effective assistance of counsel attaches when there is a Sixth Amendment right to counsel); Turner v. United States, 885 F.3d 949, 955 (6th Cir. 2018) (en banc) ("There can be no constitutionally ineffective assistance of counsel where there is no Sixth Amendment right to counsel in the first place.").

97. *See Martinez*, 566 U.S. at 6.

98. *Id.* at 6-7.

99. *Id.* at 7-8. Under current Arizona law, a defendant like Martinez might receive successive state collateral relief if their initial state habeas counsel failed to raise the IAC claim entirely. *See* ARIZ. R. CRIM. P. 32.2(b) (permitting successive collateral review for some claims not raised in prior state collateral review). However, if prior state collateral counsel raised the IAC claim but did so in a manner which was constitutionally ineffective, the defendant would be barred from renewing the claim in successive state habeas proceedings. *See id.*; State v. Evans, 506 P.3d 819, 826-27 (Ariz. Ct. App. 2022) (refusing to adopt a state version of *Martinez* and holding that defendants cannot challenge the efficacy of their state habeas counsel).

100. *See Martinez*, 566, U.S. at 17.

101. *See* Trevino v. Thaler, 569 U.S. 413, 417 (2013).

102. *See* Davila v. Davis, 137 S. Ct. 2058, 2063 (2017).

103. Shinn v. Ramirez, 142 S. Ct. 1718, 1736 (2022). *But cf. Martinez*, 566 U.S. at 8 (describing how a prior case, *Coleman v. Thompson*, 501 U.S. 722 (1991), suggested the Constitution may require states like Arizona to provide effective assistance of counsel in collateral review proceedings).

excuse a defendant's procedural default on the IAC claim in state collateral review when that was their first opportunity to raise the claim.[104] Though *Martinez* allowed defendants to challenge the efficacy of their initial trial counsel in federal court if their state habeas counsel was ineffective in raising the claim, Arizona state courts offered no analogous state remedy for ineffective habeas counsel.[105]

Finally, in *Shinn v. Ramirez* the Supreme Court announced that, while ineffectiveness of state habeas counsel could excuse a defendant's violation of the court-developed rule of procedural default, it could not exempt a defendant from the limits on evidentiary hearings imposed on federal habeas claims by Congress.[106] *Shinn* involved the cases of David Ramirez and Barry Lee Jones.[107] Both defendants challenged their convictions in state habeas proceedings.[108] During these postconviction proceedings, the defendants failed to raise—or, in Jones's case, failed to effectively raise—IAC claims regarding their trial counsel.[109] The state courts denied both defendants relief.[110] Next, the defendants challenged their convictions in federal court, arguing their state habeas counsel was ineffective for inadequately raising their trial IAC claims.[111] In Ramirez's case, the Ninth Circuit held he was entitled to an evidentiary hearing regarding his IAC claim.[112] In Jones's case, the district court permitted a seven-day evidentiary hearing on his IAC claim and held Jones's counsel was constitutionally ineffective—which the Ninth Circuit affirmed.[113] The Supreme Court reviewed the cases together and reversed them both.[114]

The Court, confronting the same Arizona procedure as in *Martinez*, did not overrule *Martinez* or comment on the constitutional validity of Arizona's scheme.[115] Instead, it focused on interpreting 28 U.S.C. § 2254(e)(2), which

104. *Shinn*, 142 S. Ct. at 1736 (quoting *Martinez*, 566 U.S. at 13).

105. *See Martinez*, 566 U.S. at 17; State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002).

106. *See Shinn*, 142 S. Ct. at 1728.

107. *See id.* at 1728-29.

108. *See id.*

109. *See id.* Jones technically did raise an IAC claim, but it was not the IAC claim the Supreme Court reviewed. *See id.* at 1729.

110. *See id.* at 1728-29.

111. *See id.*

112. *See id.* at 1728.

113. *See id.* at 1729-30.

114. *See id.* 1728.

115. *See id.*

restricts access to evidentiary hearings in federal habeas proceedings.[116] In other words, while *Martinez* allows defendants to raise an IAC claim in federal court, *Shinn* interprets § 2254(e) as barring them from proving it, and the Court refused to read any exception into the statute's text.[117] Indeed, the Court acknowledged the likely result of its holding would be to render *Martinez* claims in federal court futile.[118]

This is the doctrine as it stands now. But in resolving a novel question about procedural default in *Martinez* cases and the right to an evidentiary hearing, *Shinn* raises a new question: With no federal forum in which a defendant may present evidence in support of an IAC claim regarding state habeas counsel, does the Constitution require states to provide a forum for such evidentiary hearings? The next Part takes on this question and answers it in the affirmative.

II. An Unconstitutional Situation

In this Part, I argue that defendants in Arizona—and states with similar procedural rules—have a constitutional right to effective assistance of counsel in state habeas review to raise IAC claims regarding their trial counsel. This constitutional right in turn requires these states to provide a forum for defendants to vindicate the right.

Currently, Arizona procedural law deprives defendants of the right to effective assistance of counsel while raising IAC claims regarding their trial counsel.[119] State laws deferring IAC claims until state collateral review require defendants first to raise the claims in proceedings where they are not constitutionally entitled to effective assistance of counsel.[120] Thus, if a defendant's state habeas counsel fails to raise the IAC claim regarding the

116. *See id* at 1728, 1730.

117. *See id.* at 1728.

118. *See id.* at 1738-39.

119. Arizona postconviction defendants are appointed counsel when they allege ineffective assistance of counsel—though this is not true in all states. *See* Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 83-84 app. (2002) (documenting state statutes regulating the provision of counsel to indigent defendants in state habeas proceedings, including Arizona's, which generally offers postconviction counsel). But because there is no constitutional right to counsel in these proceedings, they lack a constitutional guarantee of that counsel's efficacy.

120. *See* State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002) (establishing that defendants may not raise IAC claims until state collateral review); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (declining to extend the right to counsel to postconviction proceedings).

defendant's trial counsel, as was the case in *Shinn*,[121] the defendant has no constitutional recourse. These defendants are therefore deprived of the ability to challenge the efficacy of their initial trial counsel with the assistance of constitutionally adequate counsel. In states where trial IAC claims can be raised on direct appeal, this is not so, because there is a Sixth Amendment right to effective assistance of counsel on direct appeal.[122]

Since Arizona's procedural rule deprives defendants of the right to bring trial IAC claims with the effective assistance of counsel, it violates the Sixth and Fourteenth Amendments as interpreted by the Supreme Court. Thus, the Constitution requires Arizona—and similar states—to institute remedial procedures.[123] Holding otherwise would require either overruling longstanding precedent or upsetting bedrock principles of our constitutional system.

Proving this claim involves three steps. First, defendants not only have a right to effective assistance of counsel on direct review, they are also entitled to the remedy of challenging the efficacy of that counsel in court.[124] Second, this remedy encompasses presenting evidence in support of the constitutional claim.[125] Third, if a state defers defendants' ability to raise certain constitutional claims from a proceeding where they are entitled to effective counsel under the Sixth Amendment to a subsequent proceeding, this entitlement carries over to the subsequent proceeding.[126]

A. The Sixth and Fourteenth Amendments Entitle Criminal Defendants to Raise IAC Claims About Their Direct Review Counsel

As discussed in Part I.B, *Evitts v. Lucey* held that criminal defendants have a right to the effective assistance of counsel on direct review.[127] In *Evitts*, the

121. *See Shinn*, 142 S. Ct. at 1728.

122. *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985).

123. It bears emphasizing here that this Note's argument is concerned only with a defendant's ability to challenge the efficacy of their *trial* counsel with the effective assistance of other counsel. I do not argue that a defendant is entitled to challenge the efficacy of their *appellate* counsel with the effective assistance of counsel. I argue only that there is a right to challenge the efficacy of appellate counsel—*with or without counsel*. And if appellate counsel cannot raise IAC claims regarding trial counsel, I argue a defendant must have counsel with which to challenge the efficacy of their initial trial counsel. Thus, nothing in the argument contravenes *Davila v. Davis*. *See* 137 S. Ct. 2058, 2062-63 (2017) (declining to extend *Martinez* to IAC claims against appellate counsel).

124. *See infra* Part II.A.

125. *See infra* Part II.B.

126. *See infra* Part II.C.

127. *See supra* Part I.B; Evitts v. Lucey, 469 U.S. 387, 396 (1985).

defendant successfully challenged the efficacy of his appellate counsel in a collateral proceeding.[128] The question becomes whether the Constitution entitles defendants to raise such a challenge in the face of state procedural rules that would otherwise prevent them from challenging the efficacy of their appellate counsel.

To conceptualize this question, imagine a world without any collateral review—that is, neither state habeas nor federal habeas review.[129] A criminal defendant's only court proceedings would be their trial, direct appeal, and potentially review on certiorari by the state or U.S. supreme court. In this world, could a state constitutionally bar a criminal defendant from raising an IAC claim on direct review? It could not, because in the absence of a forum in which to raise IAC, the right to effective assistance of counsel would be effectively nullified. There are no effective alternative remedial mechanisms.[130]

Not all constitutional rights entitle individuals to a remedy in court, especially those that can be protected through the political process.[131] But the context of IAC is distinctive. The right to effective assistance of counsel is a personal right designed to ensure the integrity of the judicial process initiated by the state to deprive the right holder of their liberty, or life.[132] Both the Sixth

128. *See Evitts*, 469 U.S. at 390-91.

129. Assume, as well, that this world is consistent with any requirements of the Suspension Clause, so there are no constitutional requirements of collateral attack on state criminal convictions. *Cf.* Felker v. Turpin, 518 U.S. 651, 663-64 (1996) (suggesting the Suspension Clause may require some form of collateral attack on criminal convictions).

130. One alternative remedy would be a malpractice claim. However, most states require exoneration to bring such a claim. *See* Clinton L. Firm, *What Constitutes "Exoneration" Sufficient to Sue Criminal Defense Counsel?*, CHI. LEGAL MALPRACTICE L. BLOG (Apr. 28, 2020), https://perma.cc/2T8V-ENK6; *see, e.g.*, Gray v. Skelton, 595 S.W.3d 633, 638-39 (Tex. 2020) (requiring exoneration for malpractice claims by criminal defendants against their lawyers and holding that even a successful IAC claim alone would not constitute exoneration).

131. *See* Webster v. Doe, 486 U.S. 592, 611-14 (1988) (Scalia, J., dissenting) (rejecting the idea that "*all* constitutional violations must be remediable in the courts"); *see, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1853-54, 1860 (2017) (declining to find an implied constitutional right of action for a violation of the plaintiff's Fourth and Fifth Amendment rights). *But see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *23 (1765))); Alden v. Maine, 527 U.S. 706, 812 (1999) (Souter, J., dissenting) ("Blackstone considered it 'a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.'" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23 (1765))).

132. *See Evitts*, 469 U.S. at 395-96.

Amendment by its own force, and the Fourteenth Amendment through procedural due process, require defendants have access to a remedy for the ineffective assistance of counsel in enforcement proceedings.

1. The Sixth Amendment requires defendants have a right to raise IAC claims regarding their appellate counsel

The right to raise IAC claims regarding counsel in proceedings during which the defendant had a constitutional right to counsel is firmly rooted in the Sixth Amendment. Indeed, the Supreme Court's decisions regarding the Sixth Amendment right to counsel assume access to a remedy. In *Strickland*, the Supreme Court described constitutionally ineffective counsel as counsel "so defective as to *require* reversal of a conviction," holding that the Constitution requires reversal—a judicial remedy.[133] If constitutionally defective counsel necessitates reversal, there must be some means to achieve that constitutionally required result. And in *Evitts*, the Court acknowledged that the right to effective assistance of counsel on appeal could trump state procedural laws.[134] Thus, the Court assumed a defendant must have a way to challenge the inefficacy of their appellate counsel, even if state procedural laws stood in the way.

The Sixth Amendment is not unique in this respect. Supreme Court decisions on other procedural rights for criminal defendants have presumed the ability to raise claims regarding those rights. For example, in *Batson v. Kentucky*, the Supreme Court created a multistep process to evaluate claims of racial discrimination in jury selection.[135] *Batson* dealt with a state conviction,[136] and it would be odd for the Supreme Court to describe the steps to proving a *Batson* violation in such depth if states were free to limit or extinguish those claims entirely. Indeed, it is unclear what the purpose of *Batson* would be at all if states were free to disregard it by preventing defendants from raising *Batson* claims in the first place. And that is the crux of the issue. If constitutional procedural protections are to mean anything, they must mean, at a minimum, that individuals have the right to resist criminal punishment by challenging the constitutional validity of the procedures

133. *See* Strickland v. Washington, 466 U.S. 668, 686-87 (1984) (emphasis added).

134. *See* 469 U.S. at 398-400.

135. *See* 476 U.S. 79, 96-98 (1986).

136. *See id.* at 82.

afforded to them. When the state fails to provide constitutionally required procedures to criminal defendants, it fails to uphold the Constitution.[137]

2. The Fourteenth Amendment's procedural due process requires defendants to have a right to raise IAC claims regarding their appellate counsel

Beyond the Sixth Amendment itself, procedural due process requires defendants have a means of remedying the ineffective assistance of appellate counsel. The Court has regularly held that defendants in enforcement proceedings have a right to raise defects in those proceedings.[138]

The Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law."[139] Though debate persists about other applications of this clause,[140] at a minimum it entitles defendants to certain procedural protections when they face a deprivation of "life, liberty, or property"—as anyone facing imprisonment or execution does.[141] And raising a constitutional claim defensively does not require a right of action or involve damages.[142]

The Supreme Court has never explicitly held that procedural due process requires that defendants can argue their counsel was constitutionally deficient, but it would strain existing precedent to hold otherwise. A state procedural law

137. *See Evitts*, 469 U.S. at 396 ("The constitutional mandate is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law.").

138. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 524-25 (2004) (plurality opinion) (acknowledging the petitioner's right to challenge, under the Due Process Clause, the procedures used to determine detentions); Londoner v. City & Cnty. Denver, 210 U.S. 373, 386 (1908) (invalidating a state's tax assessment after hearing the taxpayers' due process challenge to the procedures afforded them); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (emphasizing that the only way for the trial court to remedy the violation of the defendant's procedural due process right to be heard was by setting aside the decree in question).

139. U.S. CONST. amend. XIV, § 1.

140. *See* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999) ("There is no concept in American law that is more elusive or more controversial than substantive due process.").

141. U.S. CONST. amend. XIV, § 1; *see* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

142. *Cf.* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (finding an implied constitutional right of action against conduct by federal agents violating the Fourth Amendment); Ziglar v. Abbasi, 137 S. Ct. 1843, 1857, 1860 (2017) (suggesting Congress would "most often" decide whether a constitutional violation gives rise to damages).

violates procedural due process when "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[143] The right to effective assistance of appellate counsel is fundamental because it is a constitutional guarantee integral to the very fairness of criminal procedure.[144] Moreover, the high standard for IAC set forth in *Strickland* means that IAC directly relates to the fairness of a criminal proceeding.

Indeed, that a successful IAC claim reveals a fundamentally unfair criminal proceeding is nearly a tautology because a defendant cannot meet the *Strickland* standard for IAC unless they prove counsel's errors deprived them of a fair, reliable trial.[145] The prejudice prong ensures this—a valid IAC claim is a claim that the outcome of the trial is wrong because the state did not in fact have the authority to impose the punishment on the defendant.[146] In *Strickland* itself, the Court observed that the elements of a fair trial protected under the Due Process Clause are largely defined by the provisions of the Sixth Amendment—including the right to counsel.[147] Effective assistance of counsel is essential to the right to a fair trial protected by procedural due process. And the same is true with respect to direct appeals. In *Evitts*, the Court held that an appeal "is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."[148]

Moreover, because the right to counsel is a constitutional right, it is necessarily a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[149] Thus, the right to effective assistance of counsel is distinguishable from other, nonconstitutional

143. Patterson v. New York, 432 U.S. 197, 201-02 (1977) (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

144. Evitts v. Lucey, 469 U.S. 387, 395 (1985) ("Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.").

145. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding IAC claims require a defendant to prove their counsel's deficient performance deprived them of a fair and reliable trial).

146. *See id.* at 691-92 (detailing the prejudice standard); Martinez v. Ryan, 566 U.S. 1, 24-25 (2012) (Scalia, J., dissenting) (explaining that constitutionally ineffective assistance of counsel is "imputed to the state" because it is the state's failure to conduct a fair proceeding).

147. *Strickland*, 466 U.S. at 684-85; *see also In re* Oliver, 333 U.S. 257, 273 (1948) (including the right to counsel in a list of three essential characteristics of due process).

148. *Evitts*, 469 U.S. at 396.

149. Patterson v. New York, 432 U.S. 197, 201-02 (1977) (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)) (identifying when procedural rules violate due process); *see Evitts,* 469 U.S. at 395 (naming the right to counsel as fundamental to a fair trial).

procedures the Court had permitted states to modify, such as the procedure at issue in *Patterson v. New York*. In *Patterson*, the Court confronted a state procedural rule placing the burden on defendants—as opposed to the state—to prove the affirmative defense of extreme emotional disturbance.[150] The Court upheld the state rule because it had never been constitutionally required that the prosecution prove the nonexistence of an affirmative defense.[151] Conversely, effective assistance of appellate counsel is constitutionally required.[152] And no state has sought to deny defendants the ability to challenge the efficacy of their appellate counsel since the Supreme Court announced its decision in *Evitts*.

This understanding of procedural due process is consistent with Supreme Court precedent in other circumstances. In *United States v. Mendoza-Lopez*, the Supreme Court considered whether Congress could prevent a defendant from challenging the validity of a previous deportation order in a criminal proceeding that used the order as an element of the crime.[153] The Court held that the constitutional guarantee of due process barred Congress from denying a defendant the opportunity to challenge the sufficiency of the prior proceeding.[154] The same logic requires that defendants have an opportunity to raise their IAC claim. By raising an IAC claim, a defendant calls into question the validity of the prior criminal proceeding—whether that proceeding is an appeal or a trial.[155] And as in *Mendoza-Lopez*, procedural due process requires that defendants have an opportunity to do so.

Taken together, Supreme Court precedent establishes that the Sixth Amendment and the Fourteenth Amendment's Due Process Clause require defendants have an opportunity to remedy defects in their conviction.

B. The Constitution Entitles Defendants to Present Evidence in Support of Their IAC Claim

Because the Constitution, through the Sixth and Fourteenth Amendments, grants defendants the right to raise IAC claims, it also grants them the right to present evidence in support of those claims. The prior section explained why defendants have a constitutional right to present IAC claims—at least while facing criminal prosecution. But as things stand under *Martinez*, criminal

150. *See* 432 U.S. at 198.

151. *See id.* at 210.

152. *See Evitts*, 469 U.S. at 395-96.

153. *See* 481 U.S. 828, 833-84 (1987).

154. *Id.* at 837-38.

155. *See Evitts*, 469 U.S. at 395.

defendants in Arizona and similar states can technically raise a claim that their state habeas counsel ineffectively argued their IAC claim regarding trial counsel.[156] What *Shinn* changed is that now defendants lack a forum in which to provide evidence in support of their claim.[157] *Shinn* brings about the next question: If the Sixth Amendment and procedural due process entitle criminal defendants to a remedy for a constitutional violation, do they also entitle defendants to provide evidence to prove there was a violation in the first place? They must, because a contrary result would deprive defendants of the right in practice.

IAC is not the only constitutional right which, in the context of criminal prosecutions, can give rise to affirmative defenses. For example, the First Amendment's Free Exercise Clause allows defendants to challenge laws burdening their religious exercise that are not neutral or generally applicable.[158] If a state prosecuted a defendant under a law that violated the Free Exercise Clause, could the state prevent the defendant from presenting evidence about their religion or the law in question? Presumably not. And as discussed above, *Batson* contemplates both defendants and prosecutors presenting evidence regarding jury selection.[159] Presumably, a state could not deny defendants the right to present such evidence proving a *Batson* violation either. If states could deny defendants the ability to present evidence in defense of their claims, the states would be effectively nullifying the underlying constitutional right.

Perhaps the best example of an affirmative defense protected by the Constitution that requires defendants to present evidence is *Brady v. Maryland*.[160] *Brady* held that the prosecution must turn over exculpatory evidence requested by the defendant.[161] *Kyles v. Whitely* extended the doctrine to situations where the defendant did not request the evidence.[162] Proving the prosecution failed to disclose exculpatory evidence, especially if that evidence was not requested, requires defense counsel to add new evidence to the

156. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1737-38 (2022). *Martinez* permits federal courts to hear IAC claims regarding trial counsel that were not raised in state habeas by excusing the procedural default. *See* Martinez v. Ryan, 566 U.S. 1, 17 (2012).

157. *See Shinn,* 142 S. Ct. at 1728.

158. *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542 (1993); *see also* Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

159. *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986).

160. 373 U.S. 83 (1963).

161. *See id.* at 87.

162. *See* 514 U.S. 419, 433 (1995).

record.[163] After all, if the evidence in question were already in the record, either the prosecution did disclose it, or the defense found it regardless and the *Brady* violation would likely be considered harmless error.[164]

Like *Brady* claims, IAC claims are particularly vulnerable to a lack of evidentiary proceedings because they almost always require additional evidence beyond the record created by the allegedly ineffective prior lawyer. *Strickland* asks defendants to prove their counsel was constitutionally deficient and that the deficient performance prejudiced them.[165] As Justice Sotomayor's dissent in *Shinn* observed: "Demonstrating that counsel failed to take measures by definition requires evidence beyond the trial record."[166]

The majority agreed.[167] But Justice Thomas, writing for the Court, suggested that defendants' inability to successfully litigate IAC claims without supplemental evidentiary hearings justified dispensing with the IAC claims, rather than adopting a different reading of a federal statute.[168] For reasons that will be discussed at greater length in Part III, nothing in this Note's argument contradicts Justice Thomas's analysis.[169] He is correct that the Court is not required to read a federal statute differently in light of inadequate state procedures. After all, Congress is not constitutionally obligated to legislate solutions for states' constitutional deficiencies.[170]

It remains the case, however, that defendants are now practically unable to present evidence to support their IAC claims respecting their state habeas counsel outside of "extraordinary cases."[171] This is unconstitutional. States may impose reasonable limitations on the evidence presented through their own evidentiary rules or other procedural requirements—as they do in all criminal proceedings.[172] But a categorical bar on new evidence for IAC claims

163. *See, e.g., id.* at 422 (describing how the Louisiana Supreme Court remanded the case for an evidentiary hearing to develop Kyles's new exculpatory evidence argument).

164. *See, e.g.*, United States v. Valencia, 600 F.3d 389, 418-19 (5th Cir. 2010) (holding that the prosecution's failure to disclose its fee arrangement with a witness was a *Brady* violation but constituted harmless error because the defense nonetheless discovered the government was paying the witness).

165. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

166. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1746 (2022) (Sotomayor, J., dissenting). Extra-record evidence is frequently required because IAC claims generally rely on omission—things counsel should have done but did not. *See id.*

167. *See id.* at 1738-39 (majority opinion).

168. *Id.*

169. *See infra* Part III.

170. *See infra* Part III.

171. *See Shinn*, 142 S. Ct. at 1728.

172. *See, e.g.*, ARIZ. R. CRIM. P. 1.7(a) (requiring that court filings be submitted to the clerk). For example, nothing here suggests states cannot apply their own evidence codes to

footnote continued on next page

effectively extinguishes those claims entirely because they, almost invariably, rely on additional evidence.[173] Thus, because defendants are entitled to a remedy for constitutional inefficacy of their trial and appellate counsel,[174] they must be allowed to present evidence to prove such IAC claims.

Of course, while the defendants in *Shinn* conceded they could not meet § 2254(e)(2)'s strict standard for a federal court to grant an evidentiary hearing,[175] some defendants will be able to meet it. And there is also a narrow class of defendants who can prove IAC without supplementing the record at all. For example, if their lawyer was noticeably drunk during trial and slurred their words on the record. And Congress often limits the right to a new evidentiary hearing on collateral review to only the most egregious cases.[176] Collateral proceedings offer an example of where a defendant might not have a right to an evidentiary hearing even to raise a constitutional claim. The rationale for limiting collateral factfinding is that postconviction review necessarily follows a fully developed state proceeding where defendants could have raised their claims.[177] But this logic is inapplicable to the argument advanced here. As will be discussed at greater length in Part II.C below, in states where procedural rules bar defendants from litigating IAC claims until state habeas, that postconviction proceeding is properly viewed as the direct review proceeding—at least for the narrow purpose of raising a trial IAC claim.[178] Thus, the state proceeding is not complete, and review of the constitutional claim cannot be limited to only egregious claims. Defendants are entitled to present evidence in support of their non-frivolous IAC claims.

C. Defendants Are Entitled to Constitutionally Competent Counsel in State Habeas Proceedings that Are the Initial Review of Trial Counsel's Efficacy

In states that defer IAC claims to state habeas proceedings, defendants have a constitutional right to counsel in those proceedings for the purpose of raising

postconviction proceedings. *Cf.* ARIZ. R. EVID. (establishing which kind of evidence is admissible in Arizona court proceedings).

173. *See Shinn*, 142 S. Ct. at 1746 (Sotomayor, J., dissenting).

174. *See supra* Part II.A.

175. *See* Shinn, 142 S. Ct. at 1734.

176. *See* 28 U.S.C. § 2254(e)(2)(B) (restricting evidentiary hearings to claims where "no reasonable factfinder would have found the applicant guilty of the underlying offense").

177. *See* Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (explaining that AEDPA limits federal court review of state court decisions because "state courts are the principal forum for asserting constitutional challenges to state convictions").

178. *See infra* Part II.C.

trial IAC claims. The previous two Parts focused on appellate counsel. Part II.A explained that defendants have a right to raise IAC claims regarding their appellate counsel,[179] and Part II.B explained that they also have a right to present evidence in support of such a claim.[180] However, neither of those principles are at issue in Arizona. Defendants are free to challenge the efficacy of their appellate counsel in collateral proceedings, and they are free to present evidence of such inefficacy.[181] What *Shinn* prevents defendants from doing is presenting evidence to support their IAC claim against their *state habeas counsel*.[182] This Part argues that, even though there is no blanket right to counsel in postconviction review,[183] there is a constitutional right to counsel in state habeas review when a state prevents defendants from raising certain claims outside of state habeas proceedings.

Arizona, like many other states, bars defendants from raising IAC claims on direct review or in any proceeding before state habeas—including federal and state supreme court review.[184] While the rule may exist for sound reasons, it nonetheless defers the remedy for a violation of a constitutional right. In states without Arizona's procedural rule, defendants have a right on direct review (1) to raise an IAC claim about their initial trial counsel and (2) to do so with effective assistance of appellate counsel.[185] Arizona's procedural rule defers the first right and extinguishes the second.

Of course, just because a defendant has two rights does not necessarily mean they are entitled to raise them both at the same time. But the right to assistance of counsel is the right to have that counsel conduct an effective defense by engaging with nuanced issues of law.[186] Effective counsel is, in part, one who raises complex legal claims that could win their client's case.[187] Indeed, appellate counsel may be constitutionally ineffective for failing to raise

179. See *supra* Part II.A.

180. *See supra* Part II.B.

181. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1738-39 (2022) (acknowledging that defendants may raise *Martinez* claims, even if they are likely futile).

182. *See id.* at 1728-30 (explaining both defendants challenged the efficacy of their postconviction counsel and holding that federal courts could not hold an evidentiary hearing on their claims).

183. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).

184. *See* State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002); *see also supra* note 9 (listing states that also bar IAC claims on direct review).

185. *See supra* Part II.A; Evitts v. Lucey, 469 U.S. 387, 396 (1985).

186. *See Evitts*, 469 U.S. at 394.

187. *See, e.g.*, Payne v. Stansberry, 760 F.3d 10, 17-18 (D.C. Cir. 2014) (holding that appellate counsel was constitutionally ineffective because they failed to raise a legal challenge to the jury instructions given at trial).

IAC claims in states where they are permitted to do so.[188] Thus, when a defendant has a right to counsel, they possess a right to have that counsel to raise reasonable legal claims in their defense—including IAC claims.[189] To avoid abridging this right, states that defer raising IAC claims until subsequent proceedings must provide adequate counsel in that subsequent proceeding. Otherwise, defendants are prevented from enjoying their right to counsel on direct review because their counsel cannot raise all claims that effective counsel would have raised. Put differently, the state would render the appellate counsel ineffective by preventing them from raising meritorious legal claims. Thus, if states wish to keep this procedure, they must provide effective counsel at the subsequent proceeding for the claims they prevented appellate counsel from raising.

If states could make an end-run around the right to effective appellate counsel by deferring a defendant's ability to raise certain claims until a point when they have no right to counsel, the right to counsel would be undermined. Moreover, if such an end-run is allowed, there is no logical stopping point. A state could prevent defendants from raising any number of constitutional or other challenges to their conviction until collateral proceedings, where defendants lack a constitutional right to counsel. Such a situation would be constitutionally untenable.

When states like Arizona defer defendants' constitutional right to raise an IAC claim with constitutionally effective counsel until state habeas review, they defer the entire right. If states could, by delaying the claim of state habeas, extinguish the right to effective counsel while raising the claim, then it was no right at all. Put differently, the Court's holding in *Martinez*—that a defendant may challenge the efficacy of their trial counsel once with effective assistance of counsel—is constitutionally required.[190] However, the specific remedy

188. *See, e.g.*, Caver v. Straub, 349 F.3d 340, 348-50 (6th Cir. 2003) (holding that defendant's appellate counsel was ineffective for failing to raise an IAC claim regarding trial counsel).

189. *See Evitts*, 469 U.S. at 394 (explaining that while counsel "need not advance *every* argument," they must "play the role of an active advocate"); *Payne*, 760 F.3d at 17-18 (holding that failure to raise important claims can render counsel constitutionally ineffective); *Caver*, 349 F.3d at 348-50 (holding that failure to raise IAC claims can render counsel constitutionally ineffective).

190. Because I argue the Constitution requires the effective assistance of counsel in this narrow class of cases, I address the principal basis for the dissent in *Martinez*. Justice Scalia argues the majority erred in *Martinez* because it cannot distinguish its equitable rule from a host of other claims a defendant could only raise in state habeas, such as *Brady* claims. *See* Martinez v. Ryan, 566 U.S. 1, 19 (2012) (Scalia, J., dissenting). But even Justice Scalia acknowledged that the situation is different when there is a constitutional right to counsel. *See id.* at 24-25. He, however, argued that existing

footnote continued on next page

Martinez established—excusing procedural default and allowing the IAC claim to be heard in *federal* court—may not be constitutionally required.[191]

Nothing in *Shinn* contravenes the idea that, in the narrow circumstances where a criminal defendant has no prior opportunity to raise an IAC claim regarding trial counsel, they have a constitutional right to counsel the first time they raise it. As *Shinn* makes clear, *Martinez* relied on the Supreme Court's equitable jurisdiction—not a constitutional rule.[192] The Court's choice, pursuant to the doctrine of constitutional avoidance,[193] to rule on a narrower ground does not influence the merits of the underlying constitutional rule. The Court also cast doubt on *Martinez*'s continued viability when it intimated *Martinez* hearings could be dispensed with entirely.[194] But whether the remedy of *Martinez* hearings in federal court is constitutionally required does not change whether, in their absence, other nonfederal remedies might be.[195] Moreover, in *Coleman v. Thompson*, the Court suggested the Constitution might require some remedy,[196] a possibility the Court left open in *Martinez*.[197]

Nor would constitutionalizing *Martinez*'s holding expand existing doctrine. Instead, not affording a right to counsel in these narrow circumstances would require overruling longstanding Supreme Court precedent dating back to *Evitts v. Lucey*.[198] Declining to constitutionalize *Martinez* would require accepting that states may take away defendants' right to effective representation for a claim they are constitutionally entitled to raise. The constitutional guarantee would be meaningless, effectively denying the right.

Supreme Court precedent precludes the existence of such a constitutional right. *See id.* at 27. But this precedent is distinguished in the remainder of Part II.C.

191. *See infra* Part III.

192. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1736 (2022); *see also Martinez*, 566 U.S. at 9 ("This is not the case, however, to resolve whether that exception exists as a constitutional matter.").

193. *See Martinez*, 566 U.S. at 5 ("While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.").

194. *See Shinn*, 142 S. Ct. at 1738-39.

195. Part III will discuss at greater length what a nonfederal remedy might look like and why such a rule is consistent with *Shinn*.

196. *See* 501 U.S. 722, 755 (1991).

197. *See Martinez*, 566 U.S. at 8 (commenting that where collateral review is the first time a defendant may raise an IAC claim it "may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings" (citing *Coleman*, 501 U.S. at 755; Douglas v. California, 372 U.S. 353, 357 (1963))).

198. Evitts v. Lucey, 469 U.S. 387, 397 (1985).

The theory advanced above is narrow. It does not justify a blanket right to counsel in postconviction proceedings. This is because, unlike the theories advanced by the existing literature,[199] this Note's argument is grounded in the Sixth Amendment itself and a limited conception of procedural due process. A defendant is entitled (1) to challenge the efficacy of their initial trial counsel with the effective assistance of counsel and (2) to challenge the efficacy of their appellate counsel—but without an entitlement to effective counsel while doing so. And if their right to challenge the efficacy of their trial counsel is deferred, as it is in Arizona and many other states, their right to challenge it with the effective assistance of counsel travels with it. No more, no less.

There is a clearly defined limiting principle to this theory: Defendants have only one bite at the IAC apple. That is, the right to effective assistance of counsel does not—at least by its own force—provide a right to present an IAC claim about that counsel *with the effective assistance of counsel.*[200] Such a right exists only when a defendant has the right to effective assistance of counsel at *both* the current stage of litigation and at trial. These criteria are met, under current law, only on direct review and during state habeas if IAC claims are barred on direct review.[201] Therefore, the right to raise IAC claims ends after the first challenge to the efficacy of direct review counsel, or—in the case of states like Arizona—the first challenge to the efficacy of state habeas counsel.

Other theories for a right to counsel in habeas proceedings, grounded in other constitutional provisions, lack such a limiting principle. For example, some scholars have argued for a postconviction right to counsel deriving from the Equal Protection Clause.[202] The narrowest version of this argument, stemming from *Douglas v. California*,[203] reasons that, because the Supreme Court held there is a right to counsel for a defendant's "one and only appeal," there is a right to counsel in state habeas claims when defendants raise IAC

199. *See supra* notes 28-35 and accompanying text.

200. *Cf.* Bonin v. Vasquez, 999 F.2d 425, 429-30 (9th Cir. 1993) (explaining that the right to effective assistance of counsel cannot extend to every forum in which a defendant can raise an IAC claim).

201. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing a right to effective assistance of counsel at trial); *Evitts*, 469 U.S. at 397 (reaffirming the right to effective assistance of counsel on direct review); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (limiting the right to counsel to the initial trial and direct review); *supra* Part II.C. (arguing the right to counsel should extend to state habeas proceedings when that is the first proceeding where a defendant can raise a trial IAC claim).

202. *See, e.g.*, Uhrig, *supra* note 30, at 596; Place, *supra* note 35, at 316-21.

203. *See* 372 U.S. 353, 357-58 (1963) (deriving a right to counsel on direct review from the Equal Protection Clause).

claims regarding prior counsel.[204] Counsel is necessary because, as was the case in *Douglas*, defendants lack a brief prepared by a lawyer on the relevant issue.[205]

But this is true for IAC claims at every stage. The logic applies equally to a claim in state habeas that appellate counsel was ineffective.[206] If there is a constitutional right to counsel in state habeas for claims against appellate counsel, there must be a right to challenge that habeas counsel's efficacy in subsequent proceedings. Per the theory, in those proceedings, there would be a right to counsel to bring the IAC challenge regarding state habeas counsel because it would be a novel IAC claim. This, in turn, necessitates a subsequent proceeding to challenge that counsel's efficacy too, and a right to counsel at that proceeding. The cycle would never end. This is called the "infinite continuum" problem.[207] The Ninth Circuit took note of the issue when it declined to extend the right to counsel to postconviction proceedings.[208] The infinite continuum problem is not an issue solely because it is practically infeasible; it also means a right to counsel under the Equal Protection Clause—or other provisions with no limiting principle—would require overruling existing Supreme Court precedent in *Pennsylvania v. Finley*, which declined to extend the constitutional right to counsel to habeas proceedings.[209]

Conversely, the right-to-counsel theory advanced here has a principled stopping point. Defendants have a right to challenge the efficacy of their trial counsel with the effective assistance of counsel. After that, they have only the right to challenge the efficacy of the counsel who raised the initial IAC claim, whether that is the direct review counsel or state habeas counsel. Because they

204. *See* Place, *supra* note 35, at 322-23, 325 (quoting *Douglas*, 372 U.S. at 357) (emphasis omitted).

205. *See* Place, *supra* note 35, at 324-25. Emily Uhrig, conversely, presents a more sweeping Equal Protection Clause and Due Process Clause argument. She reasons that the two clauses require that defendants have a right to counsel when they raise *any* new claim in state habeas—not just IAC claims. *See* Uhrig, *supra* note 30, at 597.

206. *See* Place, *supra* note 35, at 325 ("The reasoning of the Court in *Douglas*, *Ross*, and *Halbert* supports a due process and equal protection right to counsel when a state collateral proceeding is the only opportunity to challenge the effectiveness of trial *or appellate counsel*." (emphasis added)).

207. *See* Emily Garcia Uhrig, *Why Only* Gideon*?: Martinez v. Ryan and the "Equitable" Right to Counsel in Habeas Corpus*, 80 MO. L. REV. 771, 773 (2015) (explaining the "infinite continuum" problem in postconviction right-to-counsel doctrine).

208. *See* Bonin v. Vasquez, 999 F.2d 425, 429-30 (9th Cir. 1993).

209. 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today."). *But see* Uhrig, *supra* note 30, at 601 (describing concerns about the infinite continuum problem as "vastly overstated").

have no further right to the effective assistance of counsel, they have no further IAC claims.

This reading easily accommodates existing Supreme Court precedent. *Finley* held defendants have no right to counsel in postconviction proceedings.[210] But *Finley* did not confront a procedural scheme like Arizona's, where defendants are barred from raising IAC claims until collateral review.[211] In states like Arizona, initial habeas counsel functions as direct review counsel for the narrow purpose of raising IAC claims regarding trial counsel. Thus, the proper reference point is how *Finley* treated IAC claims regarding direct review counsel. *Finley* never questioned a defendant's ability to raise an IAC claim regarding their appellate counsel.[212] In states like Arizona, initial habeas counsel takes the place of direct review counsel for purposes of trial IAC claims because they are the first counsel who could raise the claim. Allowing defendants in states like Arizona to challenge the efficacy of their state habeas counsel regarding trial IAC claims is thus consistent with *Finley*.

Nevertheless, some may be skeptical because this Note's argument could be read to imply a constitutional right to state habeas review. Even granting the argument set forth in this Part, the logic appears to lead to the conclusion that criminal defendants have a constitutional right to either collateral review or state supreme court review. After all, the argument suggests criminal defendants have a right to raise a claim of IAC regarding their appellate lawyer,[213] and the only place to raise this would be in a collateral proceeding or supreme court review.[214] The Supreme Court has never held that collateral review is constitutionally required.[215] Additionally, it would come as a great surprise to a majority of states and Congress that their current laws of discretionary supreme court review in most criminal cases would be unconstitutional but for collateral review. This would mean that for federal

210. *See Finley*, 481 U.S. at 555.

211. *See* Coleman v. Thompson, 501 U.S. 722, 755 (1991) (contemplating that, in cases where there is no ability to raise IAC claims on direct review, there may be room for an exception to *Finley*).

212. *See Finley*, 481 U.S at 553-54.

213. *See supra* Part II.A.

214. In states like Arizona, review by the state supreme court does not resolve the issue. Even if review were granted, defendants still could not raise IAC claims because the state requires that the claims be raised in collateral review, not merely after direct review. *See* State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002).

215. *Cf.* Felker v. Turpin, 518 U.S. 651, 663-64 (1996) (hinting, but not holding, that the Constitution could require postconviction collateral proceedings for criminal convictions).

crimes, absent habeas review, the Supreme Court's near-entirely discretionary docket would be unconstitutional.[216]

Not quite. Happily, the argument's consequences are not so dramatic, its logic is consistent with state and federal practice since the Supreme Court first held defendants have a right to adequate assistance of counsel, and it derives from the Supreme Court's own case law.

First, all that is required under this Note's argument is a narrow opportunity to review the adequacy of state habeas trial counsel's performance with respect to one claim—not collateral review of the entire proceeding—and only in the narrow circumstances where states defer IAC claims until postconviction proceedings. Though defendants must be allowed to present evidence of IAC, states could opt to screen out frivolous petitions through something analogous to a motion to dismiss.

Second, this Note proposes a lesser requirement than what states and the federal government have provided since long before *Gideon*. During Reconstruction, Congress passed the Habeas Corpus Act of 1867, which created collateral review for the convictions of both state and federal prisoners.[217] Under this and current law, state convictions are reviewed by federal courts not just for IAC but for any inconsistencies with federal law.[218] Conversely, the *Gideon* Court first held the Sixth Amendment requires states provide counsel to all criminal defendants in 1963—nearly a century later.[219]

True, the Framers might be surprised to learn the Constitution required even this narrow form of review. Trials in federal court at the Founding did not provide postconviction collateral review.[220] But the Framers would probably be no more surprised to learn this than that the Sixth Amendment

216. *See* SUP. CT. R. 11 (limiting Supreme Court review by writ of certiorari to only cases "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in [the Supreme] Court"); SUP. CT. R. 20 ("Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised.").

217. Ch. 28, § 1, 14 Stat. 385 (1867) (codified as amended at 28 U.S.C §§ 2241-43, 2251).

218. *Id.*; *see also* United States v. Hayman, 342 U.S. 205, 211-13 (1952) (discussing the Habeas Corpus Act of 1867 and petitions for relief under it by both state and federal prisoners).

219. Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963); *see also* Powell v. Alabama, 287 U.S. 45, 73 (1932) (announcing a constitutional right to counsel under the Sixth Amendment in certain cases).

220. *See supra* Part I.B (recounting the creation of collateral review in the mid-nineteenth century); 14 Stat. at 385 (establishing, for the first time, systemic postconviction collateral review).

required states to provide counsel to indigent criminal defendants in the first place.[221]

Finally, requiring a minimal opportunity for defendants to raise an IAC claim regarding their appellate counsel is the logical consequence of *Evitts*.[222] As described at length above, if defendants have a right to adequate counsel on their direct appeal,[223] the state cannot incarcerate them without providing at least an opportunity to raise a claim regarding that counsel's competency.

III. What Comes Next?

This Part explains how the Court's decision in *Shinn* creates an unconstitutional situation that requires states like Arizona to create additional procedures. The previous Part argued that defendants in states that defer IAC claims to state habeas proceedings have a constitutional right to counsel in those proceedings—at least for the deferred IAC claims.[224] It also argued that when the Constitution guarantees defendants the right to counsel in a proceeding, they have a right to raise, and present evidence in support of, an IAC claim regarding that counsel.[225] The upshot of all this is that defendants in such states require a forum to raise, and present evidence in support of, IAC claims regarding the state habeas counsel who ineffectively raised (or failed to raise) their trial IAC claim.

At first blush, this argument runs up against the Court's decision in *Shinn v. Ramirez*. *Shinn* held that defendants are not entitled to an evidentiary hearing to support IAC claims regarding state habeas counsel in states like

221. That the Founding generation would be surprised by the current state of constitutional protections for criminal defendants may be more indicative of how the criminal justice system has transformed over the intervening centuries than a difference in how they understood the Constitution. Criminal justice in the Founding and colonial periods looked radically different from the modern era. *See* Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1679-83 (2017) (describing the colonial-era criminal justice system). Rather than a professional class of prosecutors, victims generally prosecuted their own cases. *Id.* at 1679. And the trial focused more on morality than criminal procedure. *See id.* at 1680. When the Supreme Court announced a right to counsel for the indigent in *Gideon v. Wainwright*, it emphasized how much the criminal justice system had changed—particularly with the advent of professional prosecutors. *See* 372 U.S. 335, 344 (1963). Thus, indigents' right to counsel arguably leveled the playing field in a way more analogous to the Founding generation's criminal justice system.

222. *See* Evitts v. Lucey, 469 U.S. 387, 397 (1985) (holding that defendants have a right to effective assistance of counsel on appeal).

223. *See id.*

224. *See supra* Part II.C.

225. *See supra* Parts II.A-B.

Arizona that require they raise their trial IAC claims in state habeas proceedings—or, for that matter, in any other state.[226] If, as this Note argues, the Constitution requires that defendants have a right to present evidence regarding the inefficacy of their state habeas counsel in states like Arizona, and *Shinn* interprets AEDPA to deny defendants such a right, AEDPA might appear unconstitutional.

This conclusion is wrong for two reasons. First, *Shinn* itself did not declare AEDPA unconstitutional. The majority did not frame its decision as constitutional in nature.[227] Instead, it was an exercise in statutory interpretation.[228] If the Court believed denying an evidentiary hearing in federal habeas proceedings violated the Constitution, it would presumably have read the statute differently or else struck it down.[229] Unless the Court is inclined to revisit its decision in *Shinn*, and there is no reason to believe it is, the federal statute is constitutional.

Second, and more fundamentally, the inability of defendants to vindicate a constitutional right in state court does not render a federal statute unconstitutional. The constitutional violation requires a remedy, but it does not require a remedy in *federal* court.[230] States that defer IAC claims to state habeas are perfectly capable of providing a forum for defendants to challenge the efficacy of state habeas counsel. Their refusal to do so does not compel Congress to legislate a solution.

In essence, federal habeas review had provided a stopgap measure for the states until *Shinn*. Once states began to defer IAC claims to state habeas proceedings, the Supreme Court temporarily resolved the situation via *Martinez* and *Trevino*. Defendants in states like Arizona could challenge the efficacy of their state habeas counsel in federal court—at least if it was a substantial claim.[231] Thus, though such states still lacked procedures adequately protecting the constitutional rights of defendants, the defendants suffered no injury because the federal courts had stepped in to resolve the issue by offering a forum for the IAC claims.

226. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1728 (2022).

227. *See id.* at 1734 ("We now hold that, under §2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel.").

228. *See id.*

229. *See* Brief for Respondent at 44-47, *Shinn*, 142 S. Ct. 1718 (No. 20-1009), 2021 WL 4197216 (arguing that adopting Arizona's reading of AEDPA would undermine the Sixth Amendment).

230. *Cf.* Young v. Ragen, 337 U.S. 235, 239 (1949) (requiring Illinois state courts to adopt adequate procedures to protect federal rights rather than creating a remedy in federal court).

231. *See* Martinez v. Ryan, 566 U.S. 1, 9 (2012); Trevino v. Thaler, 569 U.S. 413, 417 (2013).

Now, with *Shinn*, the federal courts have stepped away. The federal forum afforded in *Martinez* and *Trevino* no longer remedies the constitutional violation because defendants cannot present new evidence in support of their state habeas IAC claims.[232] The federal courts' departure leaves a constitutional void that the states must fill.

Previously, when the Supreme Court confronted a similar situation, it also left the procedural remedy to the states. In *Young v. Ragen*, the Court addressed the question of what procedures should be afforded to a defendant deprived of their federal rights in state court.[233] As the Court framed it: Illinois state courts of last resort were refusing to consider defendants' claims that their federal rights had been infringed.[234] The Court held the federal Constitution required a means for defendants to challenge deprivations of their federal rights.[235] Yet the Court stressed that it fell to the states to develop procedures that would allow defendants to vindicate their federal rights.[236] Despite the violation of a federal right, the Court did not explore a remedy in federal court.[237] In response to the Court's decision, states did develop a procedural remedy—namely, state habeas proceedings.[238]

The Court's holding in *Ragen* is instructive here. The Constitution requires defendants have an opportunity to challenge the efficacy of their state habeas counsel when it is their first opportunity to raise IAC claims about their trial counsel.[239] It does not require a remedy in the federal courts.[240] And as in

232. *See Shinn*, 142 S. Ct. at 1734; *see also SCOTUS Reverses Ninth Circuit Habeas Win, Cutting Back on Martinez and Trevino by Prohibiting Consideration of Evidence Beyond the State Court Record*, DEFENDER SERVS. OFF. (May 23, 2022), https://perma.cc/2YEK-3VF5 ("In reaching its decision, the Court all but overrules [*Martinez* and *Trevino*, which] recognized a critical exception to the general rule that federal courts may not consider claims on habeas review that were not raised in state court.").

233. *Ragen*, 337 U.S. at 236.

234. *See id.* at 238.

235. *See id.* at 239.

236. *See id.* ("We recognize the difficulties with which the Illinois Supreme Court is faced in adapting available state procedures to the requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights. Nevertheless, that requirement must be met.").

237. *See id.*

238. *See* Place, *supra* note 35, at 313 ("States began adopting post-conviction procedures in the 1950s in response to the United States Supreme Court's decision in *Young v. Ragen*.").

239. *See supra* Part II.C.

240. *Cf. Ragen*, 337 U.S. at 239 (directing states to develop their own remedies to constitutional violations rather than creating a remedy in federal court).

Ragen, states can determine the means to accommodate the federal right.[241] If they decline to do so, they cannot defer IAC claims to state habeas proceedings.

Another line of cases confirms that states may have an obligation to provide a forum for federal constitutional claims when the defendant is constitutionally entitled to a remedy.[242] The Court's decision in *General Oil Co. v. Crain* established that states have an obligation to entertain a suit when the moving party has a constitutional right to injunctive relief.[243] In *Crain*, the plaintiff sued to enjoin the enforcement of a Tennessee law on the grounds that the law was unconstitutional.[244] The Tennessee courts dismissed the case because a state statute stripped Tennessee courts of jurisdiction for certain suits against state officers.[245]

The Supreme Court ultimately affirmed the decision below, but only because it held the state did not violate any constitutional rights.[246] It emphatically rejected the defendant's argument that the Tennessee courts could decline jurisdiction when a party possessed a constitutional right to a remedy.[247] The Court explained that, if a party has the right "to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court."[248] Courts, of course, may not give effect to unconstitutional laws.[249]

241. *See id.*

242. Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905, 929 (2017) (arguing that AEDPA's restrictions on hearing claims regarding new substantive rules of constitutional law in the first instance does not render AEDPA unconstitutional but rather requires states to provide habeas relief in narrow circumstances).

243. *See* 209 U.S. 211, 228 (1908) ("It being then the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court."); Vázquez & Vladeck, *supra* note 242, at 938 ("*Crain* thus held that, if a plaintiff has a constitutional right to injunctive relief, a state law denying its courts jurisdiction to entertain an action seeking such relief was itself unconstitutional.").

244. *See Crain*, 209 U.S. at 214-15.

245. *See id.* at 216.

246. *See id.* at 231.

247. *See id.* at 228. More recently, the Supreme Court has held that if states create a forum to hear federal claims, they must afford relief where substantive federal law prevents the defendant's punishment. *See* Montgomery v. Louisiana, 577 U.S. 190, 204-05 (2016) ("If a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'" (quoting Yates v. Aiken, 484 U.S. 211, 218 (1988))).

248. *See Crain*, 209 U.S. at 228.

249. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

The logic of *Crain* extends to states' obligation to provide a forum for IAC claims regarding state habeas counsel when there is a constitutional right to the efficacy of that counsel. Like the injunctive relief sought in *Crain*, the right to effective assistance of counsel is a federal right for which defendants are constitutionally entitled a remedy.[250] As in *Crain*, the constitutional violation stems from state action. In *Crain*, it was a state law regulating conduct;[251] here, it is state procedural rules that define when defendants may raise IAC claims.[252] The *Crain* Court mused that because there was no available remedy in federal court, the federal right would be nullified if states courts did not hear the constitutional claim.[253] The same is true here.

The forum that states must create for habeas counsel IAC claims does not need to provide an entirely new trial. States would have considerable flexibility in designing the proceeding. To meet the constitutional minimum, states would only need to provide a mechanism for defendants to allege that their state habeas counsel was ineffective and a forum in which to present evidence in support of that claim. States could, for example, use a sort of pleading standard to screen out frivolous claims, denying an evidentiary hearing to defendants who do not allege conduct that could plausibly constitute ineffective assistance of counsel.

Requiring states to provide a forum for constitutional violations is not only consistent with past Supreme Court practice, but it also addresses the federalism concerns animating the Court's decision in *Shinn* and Justice Scalia's dissent in *Martinez*. Both opinions emphasized how the federal proceedings infringed on state sovereignty.[254] To the *Shinn* Court, the seven-day federal evidentiary hearing in the case below exemplified how IAC evidentiary hearings constituted a "wholesale relitigation of [the defendant's] guilt."[255] A critical aspect of such intrusions into state sovereignty is that these proceedings are conducted in federal courts.[256] They are not subject to state

250. *See supra* Part II.A (arguing that IAC requires a remedy).

251. *See Crain*, 209 U.S. at 213-15.

252. *See, e.g.*, State v. Spreitz, 39 P.3d 525, 526-27 (Ariz. 2002).

253. *See Crain*, 209 U.S. at 226.

254. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1738 (2022) (characterizing federal IAC evidentiary hearings as an "improper burden imposed on states"); Martinez v. Ryan, 566 U.S. 1, 26 (2012) (Scalia, J., dissenting) (assailing the majority for failing to consider respect for the states).

255. *Shinn*, 142 S. Ct. at 1738.

256. *See* Engle v. Isaac, 456 U.S. 107, 128-29 (1982) (describing how the use of procedural default to push claims into federal court deprives "state appellate courts" of "a chance to mend their own fences and avoid federal intrusion").

procedural rules, and they are not decided by state judges.[257] If the IAC proceedings, though still required by the federal Constitution, were conducted in state court, they would accommodate the federalism interests protected by AEDPA. This approach is consistent with the growing importance of state habeas proceedings. The retraction of federal habeas review and the increasing salience of constitutional issues requiring additions to the trial record—including IAC—is already elevating the burden state collateral review shoulders in the criminal adjudicatory system.[258]

Thus, this Note's approach is correct not only because it follows existing Supreme Court precedent and doctrine, but also because it meets the substantive concerns animating the doctrines. Relying on states to provide defendants a forum to raise, and present evidence in support of, IAC claims regarding their state habeas counsel balances strong federalism interests with the procedural right the Constitution affords criminal defendants.

Conclusion

Defendants have a constitutional right to raise an IAC claim about their state habeas counsel in states that defer trial IAC claims to state habeas.[259] This constitutional right derives from three propositions. First, the constitutional right to the effective assistance of counsel, which extends to a defendant's first appeal,[260] includes a right to a forum in which to vindicate that right—namely, a proceeding that allows defendants to present an IAC claim.[261] Second, the right to raise an IAC claim includes the right to present evidence in support of that claim.[262] Third, defendants have a right to challenge the efficacy of their initial trial counsel with the effective assistance of counsel, regardless of when a state permits them to first raise that claim.[263]

If all three of these propositions are true, defendants in states that defer IAC claims to state habeas proceedings have a right to counsel in their initial state habeas proceeding.[264] This right would empower indigent defendants to

257. *See id.* at 129 ("Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules.").

258. *See* Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 453 (2017).

259. *See supra* Part II.C.

260. *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985).

261. *See supra* Part II.A.

262. *See supra* Part II.B.

263. *See supra* Part II.C.

264. *See supra* note 9 (documenting states which defer IAC claims to state postconviction proceedings).

challenge the validity of their initial trial and ensure they were not deprived of their proper day in court. And even defendants in states that already provide counsel in state habeas proceedings would be entitled to a subsequent proceeding ensuring their postconviction counsel represented them effectively. Although it is not the focus of this Note, the logic could extend to more than just the seven states that completely bar defendants from raising IAC claims during direct review,[265] potentially encompassing the majority of states which usually defer IAC claims until after direct review.[266]

Yet these constitutional protections for defendants remain balanced with federalism and states' interest in finality. IAC claims retain clear boundaries, and states are not forced to relitigate their cases in federal court. This is the balance struck by the Constitution and the Supreme Court's precedent.

For a time, the Supreme Court's decision in *Martinez v. Ryan* papered over this constitutional issue, providing a remedy in federal court where none existed in state court.[267] But the Court's decision in *Shinn v. Ramirez* resurrected the constitutional issue by withdrawing the federal courts from most of these cases.[268] As the Supreme Court explained in *Martinez*, states' decisions to defer IAC claims to subsequent proceedings, though premised on sound reasons, "[are] not without consequences."[269] With the federal courts now largely out of the picture, it is time for states to face those consequences. They must either guarantee the effective assistance of counsel in initial state habeas proceedings for trial IAC claims, or they must abandon their procedures deferring IAC claims to state habeas proceedings.

265. *See* supra note 9.

266. *See* supra note 9.

267. *See* 566 U.S. 1, 9 (2012) (holding that defendants may raise IAC claims in federal court if their state habeas counsel was ineffective and the defendants could not have raised IAC claims before).

268. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1738-39 (2022) (explaining that *Martinez* hearings will now serve little purpose).

269. *See Martinez*, 556 U.S. at 13.

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Applicant Education

BA/BS From	**Boston College**
Date of BA/BS	**May 2020**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 21, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Immigration Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Loiselle Moot Court Competition**

Bar Admission

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Judicial Internships/ Externships	**No**
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This applicant has certified that all data entered in this profile and any application documents are true and correct.